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No. 362

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consolidated Cases Nos. 13,201 and 13,202

[illegible], Jr., et al., *Appellants*

v.

VIOLA A. [illegible], et al., *Appellees*

Appeal From the [illegible] District Court
For the District of Columbia

United States Court of Appeals
For the
District of Columbia Circuit
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QUESTIONS PRESENTED

1. D. C. Code Section 21-311 requires that a petition for a Writ De Lunatico Inquirendo be accompanied by the affidavits of two responsible residents of the District of Columbia. Appellee Hodson accompanied her verified petition in her lunacy proceeding against Mrs. Dorothy Smallwood Geare with the affidavits of Drs. Campbell and Cohen. The doctors' affidavits were procured and filed by Appellee Hodson with her petition. In the joint trial of cases involving, among other issues, an issue of Mrs. Geare's mental capacity to make a deed and will in favor of Appellee Hodson, appellants proffered the doctors' affidavits and her petition as "admissions against interest." The District Court received her petition in evidence but excluded the doctors' affidavits from the evidence. The question is: Were the doctors' affidavits admissible in evidence as admissions by reference and/or adoption?

2. The trial court excluded, as not admissible under the Federal Shopbook Rule, a part of the record of Saint Elizabeths Hospital which was a factual statement of the history of the patient, Dorothy S. Geare, which statement was given by Appellee Hodson and recorded by a member of the hospital staff at the hospital, within a few days after the admission of the patient, and soon after the execution of the will and deed in question, in the regular course of the business of the hospital, for use by the hospital staff. The record contained admissions by Appellee Hodson which were inconsistent with her position in these cases. The record was material to: (1) the issue of mental capacity, (2) the issue of undue influence, duress and coercion, (3) the issue of fraud and deceit, and (4) the credibility of the Appellee Hodson. The question presented is: Was this part of the hospital record admissible under the Federal Shopbook Rule?

3. Did the trial court err in giving on repeated occasions during their deliberations and after the jury had reported that it appeared to be a "hung" jury, supplemental instructions to the jury which included parts of the language from approved charges, but which parts were employed repeatedly and in a manner which coerced the minority of the jury into changing their position and joining in a verdict within three minutes after the Court told them that they were the jury which had to decide the case? Did the court err in refusing to instruct the jury also that no individual juror need give up his own convictions?

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consolidated Cases Nos. 13,201 and 13,202

GRAHAME THOMAS SMALLWOOD, JR., ET AL., *Appellants*

v.

VIOLA A. HODSON, ET AL., *Appellees*

Appeal From the United States District Court For the District of Columbia

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT.

Case No. 13,201 is an appeal from a judgment based on findings of fact and conclusions of law of the District Court sustaining a deed. The District Court had jurisdiction under Section 11-306 of the District of Columbia Code, 1951 Edition.

Case No. 13,202 is an appeal from a judgment admitting a will to probate and granting letters testamentary,

after a verdict sustaining the will. The District Court had jurisdiction under Sections 11-503 and 19-312 of the District of Columbia Code, 1951 Edition.

This Court has jurisdiction of both appeals under Section 1291, Title 28, of the United States Code Annotated.

STATEMENT OF CASES

Case No. 13,201 arises out of an action, in the nature of an equity proceeding, to set aside a deed from Dorothy Smallwood Geare, deceased, to the Appellee Hodson.

Case No. 13,202 arises out of a contest of a will purporting to be the last will and testament of Dorothy Smallwood Geare, deceased.

Parties

Appellants are the nephew and nieces and the only heirs at law and next of kin of Dorothy Smallwood Geare, deceased, who died on December 28, 1954. In the District Court, they were the plaintiffs in the action to set aside the deed and in the will contest.

Appellee Hodson is the sole grantee in the deed dated February 2, 1954, and recorded April 14, 1954, whereby the Decedent Geare conveyed to her without any consideration a valuable piece of real estate in the District of Columbia, improved by a house, which was furnished and bringing in rent of $156 per month. She was the sole defendant named in the appellants' complaint to set aside the deed. Appellee Hodson is also the executrix and principal beneficiary of a paper writing dated February 2, 1954, purporting to be the last will and testament of Dorothy Smallwood Geare, deceased, and is the defendant in the will contest.

Appellee Studt is the grantee in a deed from the Appellee Hodson, *which was recorded after the filing of the action involved in Appeal No. 13,201*, whereby the Ap-

pellee Hodson conveyed to the Appellee Studt an undivided one-half interest in the real estate conveyed by the Decedent Geare to the Appellee Hodson. She was granted leave to intervene as a defendant in the appellants' action to set aside the deed from the Decedant Geare to the Appellee Hodson. Appellee Studt is also a beneficiary of the paper writing purporting to be the last will and testament of Dorothy Smallwood Geare, deceased.

The Issues

The points on which the appellants rely on these appeals relate to the issues of the mental capacity of Dorothy Smallwood Geare to make the deed and will involved, and whether the deed and will were obtained, or the execution of them, procured from her by the fraud, deceit, undue influence, duress or coercion of the Appellee Hodson, and whether the Decedent Geare revoked the will.

The Record

In each case in the District Court, appellants filed a statement of the points on which they rely and designated for inclusion in the records on these appeals only those portions of the proceedings and evidence at the trial which relate to the points on which they rely, as required by Rule 75(d) and (e) of the Federal Rules of Civil Procedure. (App. 10 and 19-47)

The District Court ordered these cases consolidated for a joint trial. (App. 6 and 14) The cases were tried jointly. The action to set aside the deed (Appeal No. 13,201) was tried by the court without a jury and simultaneously the will case (Appeal No. 13,202) was tried before the court and a jury. As a result, the two points on which the appellants rely in Appeal No. 13,201 are the same as the first two of the three points on which the appellants rely in Appeal No. 13,202 and, in relation to these two points, the facts are the same in both cases. (App. 10 and 19)

Facts Relating to Point No. 1 that the District Court Erred in Excluding from the Evidence the Affidavits of Doctors Campbell and Cohen Filed in Mental Health Case No. 600-54 (Plaintiffs' Exhibit No. 1).

Appellants' counsel called Appellee Hodson as an adverse witness. Her testimony disclosed that on April 30, 1954, less than three months after the date of the deed and will involved, she filed her verified petition in the District Court for a Writ De Lunatico Inquirendo to require Dorothy Smallwood Geare to show cause why she should not be adjudged to be a person of unsound mind, and, among other things, alleged:

> "4. Respondent does not have any property, real or personal, other than her immediate personal effects and clothing. Her only income is the sum of $57.00 monthly from the Civil Service Retirement Fund.
>
> "5. Petitioner states that the mental condition of respondent has progressively worsened since her retirement from United States Government Service in July, 1953. She is unable to care for her person. She is confused and imagines that she is in San Francisco. Petitioner believes that respondent is incapable of managing her own affairs and is not fit to be at large or to go unrestrained and, if permitted to remain at large, the rights of persons and property will be jeopardized and, further, that respondent is a fit subject for treatment because of her mental condition." (App. 24)

Appellants offered the petition in evidence and it was received as Plaintiffs' Exhibit No. 1. (App. 21, 23-24)

As required by statute, (D.C. Code Section 21-311) Appellee Hodson accompanied her aforementioned petition by the affidavits of two responsible residents of the District of Columbia; namely, Doctors Campbell and Cohen. (App. 26-27)

Counsel for appellants began to prove the affidavits of Doctors Campbell and Cohen, and, when he had proved it, offered the affidavit of Dr. Campbell "as an admission

against interest." Counsel for appellees objected and the court said: "Objection sustained. It is not an admission of this witness.". After further questioning of the witness by counsel for appellants, the court said: "I am not going to admit an affidavit attached to a petition, executed by a third party, as an admission against interest by the petitioner." (App. 22-23)

The futility of proceeding further with the proof of the affidavit of Dr. Cohen, which, like the affidavit of Dr. Campbell, was attached to and was filed with the petition of the Appellee Hodson for the Writ De Lunatico Inquirendo, having become apparent as a result of the court's ruling on the proffer of the affidavit of Dr. Campbell, a formal proffer of the affidavit of Dr. Cohen became unnecessary and was not made.

The affidavit of Dr. Campbell appears on page 26 and the affidavit of Dr. Cohen on page 27 of the Appendix. As will be observed from a reading of their affidavits, the doctors related substantial facts showing the mental incapacity of Dorothy Smallwood Geare and expressed their opinions that she was of unsound mind. The affidavit of Dr. Campbell showed that he had Mrs. Geare under his care and treatment since her retirement from Government employment, which the petition of Appellee Hodson showed was in July, 1953, and which his affidavit made on April 30, 1954, showed was "last year." He stated "that he has observed Mrs. Geare for some months and found that her mental condition has progressively worsened" and "that her mental condition has deteriorated markedly since her retirement from Government employment last year, . . ." (App. 26).

Facts Relating to Point No. 2 that the District Court erred in Excluding from the Evidence the Records of Saint Elizabeths Hospital (Plaintiffs' Exhibit 14).

Appellee Hodson's testimony showed that when Dorothy Smallwood Geare was transferred to Saint Eliza-

beths Hospital, an official at the hospital asked her to inform the hospital of the history in Mrs. Geare's case, and she spoke to one person at the hospital. Counsel for appellants offered in evidence that portion of the hospital's records showing the history of Mrs. Geare furnished on that occasion by Appellee Hodson. The hospital records had been identified by a hospital employee. (App. 28-31, 34-35)

Counsel for appellants stated to the Court: "* * * All I want to offer from those records are the factual matters which would be admissible under the decision in Taylor versus New York Life Insurance." (App. 35)

The proffer of the specified portion of the hospital records, the objection thereto and the District Court's ruling appear in the Appendix on pages 28 to 31 and on page 35. The portion of the hospital records that was proffered appears in the Appendix on pages 32 to 34. (Plaintiffs' Exhibit No. 14)

The proffered history of Mrs. Geare's "Present Illness," furnished the hospital by Appellee Hodson, showed that Mrs. Geare's illness began in January, 1953, which was more than a year before she executed the deed and will; that in the summer of 1953, she became too exhausted to go to work; that her appetite had been poor all of 1953; that she needed more sleep than usual but during the winter of 1953, she was unable to sleep at night; that during the early months of 1954, she "seemed to be going more and more into a stupor," that she had several heart attacks during March and April after the stuperous condition had begun; that during March "she did not recognize her old home that she lived in for quite a while;" that she would greet people who were not there; that when she went to Emergency Hospital on February 18, Appellee Hodson heard her say, "My stomach says, 'what do you know about that?'" That she thought "that she was in San Francisco;" that at Emergency Hospital

"she got out of bed and began to pull the clothes of other patients. It was then that they asked that she be removed from the hospital. Hence, on the 30th, she was brought to Saint Elizabeths Hospital."

Facts Relating to Point No. 3—The District Court's Instructions to the Jury in the Will Case (Appeal No. 13,202) When the Jury Returned to Open Court After the Case Had Been Submitted to Them and During Their Deliberations.

The will case was submitted to the jury at 2:45 o'clock p.m. on November 1, 1955. At 5:30 p.m. on the same day, the District Court had the jury brought into open court to ask whether "you are likely to reach a verdict very shortly, or not?" The foreman replied that "it looks like we will not reach a verdict very shortly." Whereupon, the Court asked whether the jury had reached a verdict as to any one of the three issues submitted to them, and when the foreman informed the Court that the jury had reached a verdict on the issue of mental capacity but not on the other two issues; namely, the issues of undue influence and revocation, the court took the verdict on the issue of mental capacity. The verdict was that the testatrix was of sound and disposing mind and capable of executing a valid deed or contract on February 2, 1954. (App. 36-37)

The jury was directed to resume deliberations at 10 o'clock a.m. on November 2, 1955, and at 12:10 o'clock p.m. on that date, the jury was brought into open court again, as a result of a note from the foreman that the jury had not reached agreement on the issues of undue influence and revocation and requested that the court "reinstruct the jury" on those issues. Thereupon, the Court reinstructed the jury on those issues and said: "Does any member of the jury desire to ask anything further?" Thereupon, a colloquy occurred between the Court and Juror No. 8 which tended to show that that Juror did not believe Appellee Hodson because she had

sworn under oath and signed a paper "stating that Mrs. Geare had no money to pay for hospital care. And, as I understand it, that wasn't right." (App. 37-39)

The jury resumed its deliberations at 12:25 o'clock p.m. on November 2, 1955, and at 2:55 o'clock p. m. on the same date, the jury sent a note from its foreman to the Court reading as follows:

> "We the jury have not reached an agreement on Issues No. 2 and 3. We do not appear to be close to reaching an agreement. This appears to be a hung jury. All members affirm their decisions."

Thereupon, the District Court said:

> "Well, I am quite sure this is not a hung jury. I am not going to accept this statement, ladies and gentlemen of the jury. This trial took about three or four days. It cost the taxpayers a considerable amount of money. In fact, it has taken parts of five days, and the case should be decided.
>
> "....."

The Court then proceeded to instruct the jury concerning their duty and responsibility during the course of their deliberations and concluded with the statement 'and I see no reason why you should not promptly reach a verdict.'" The jury retired again at 3:00 o'clock p.m. (App. 41)

At 3:45 o'clock p.m. on the same date, the Court recalled the jury to open court and inquired of the foreman concerning what progress the jury was making toward arriving at a verdict and whether they were likely to have a verdict "very shortly?". The foreman replied that "It doesn't appear, Your Honor, that we will have a verdict very shortly." The Court then inquired as to whether the jury had agreed on either of the two remaining issues, and the foreman informed the Court that the jury was not. The Court then announced an intention

to release the jury until 10:00 o'clock the next morning and then stated:

> "I want you all, each one of you, to bear in mind the suggestions that I made to you at three o'clock, when you were back here, namely, that we have spent five days trying this case. That is an expense to the taxpayers. You should reach a decision. Some jury will have to decide this case and you should be that jury, because no other jury will know any more about the case than you do. And I want to repeat, again, that if a large majority is one way or the other—and I don't care which way—then the minority should be humble enough to ask themselves whether they ought not reconsider their views.
>
> "....."

The Court then proceeded to repeat many of the things stated to the jury when it announced at 2:55 o'clock p.m. on the same date that it appeared to be a hung jury and that all members of the jury affirmed their decisions. (App. 42-43)

The jury resumed its deliberations at 10:00 o'clock a.m. on November 3, 1955. The jury was brought back in open court at 2:45 o'clock p.m. on that date, as the result of a note from its foreman, reading as follows:

> "We, the jurors, request that we be reinstructed regarding our responsibilities to get together on a unanimous verdict."

Thereupon, the Court again repeated briefly the instructions given on two prior occasions. Among other things, the Court added a statement that "All available evidence that is admissible under the rules of law have been brought before you. And a decision has to be reached by a jury, and you are that jury." At the close of the Court's further instructions, the following occurred:

"Now, is there anything else that any member of the jury would like to ask the Court?

"The Foreman: 'Your Honor——'

"The Court: 'Mr. Foreman?'

"The Foreman: 'I don't have a question of my own, but I think one member of our panel would like to ask a question.'

"(One of the lady jurors indicated that she did not wish to ask a question.)

"The Foreman: 'I am sorry, Sir. I was mistaken.'

"The Court: 'I hope you will reach a verdict. This case took about five days to try. You have all the evidence. You have been out for a long time. I think you ought to reach a verdict promptly. I hope you will do so.'"

Thereupon, counsel for appellants requested the Court to instruct the jury that no individual juror need give up his own convictions, and the Court said: "I deny the request." (App. 45-46)

Thereupon, the Court said to the jury: "You may retire to the jury room and I hope you will have a verdict very promptly." The jury retired to the jury room at 2:55 o'clock p.m., and in three minutes returned to the court room at 2:58 o'clock p.m., and the foreman announced that the jury had reached a verdict on the issues of undue influence and revocation. The verdict on both issues was in favor of the appellees. (App. 46-47)

STATUTES AND RULES INVOLVED

United States Code Annotated, Title 28, Section 1732, formerly Title 28, Section 695:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such

business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind. June 25, 1948, c. 646, 62 Stat. 945."

District of Columbia Code, 1951 Edition, Section 21-311:

"Upon the filing with the court of a verified petition as hereinabove provided, accompanied by the affidavits of two or more responsible residents of the District of Columbia setting forth that they believe the person therein named to be insane or of unsound mind, the length of time they have known such person, that they believe such person to be incapable of managing his own affairs, * * * the court, or any judge thereof in vacation, may, in its or his discretion, issue an attachment for the immediate apprehension and detention, for preliminary examination, of such person in Saint Elizabeths Hospital * * *."

Federal Rules of Civil Procedure:

Rule 75 (d)

"(d) Statement of Points. No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal. As amended Dec. 27, 1946, effective March 19, 1948."

Rule 75 (e)

"(e) Record To Be Abbreviated. All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all

exhibits and more than one copy of any documents shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties."

STATEMENT OF POINTS

1. The Court erred in excluding from the evidence the affidavits of Neil P. Campbell, M. D., and Roger S. Cohen, M. D., filed in Mental Health No. 600-54 in this court (Plaintiffs' Exhibit 1).

2. The Court erred in excluding from the evidence the records of St. Elizabeths Hospital (Plaintiffs' Exhibit 14).

3. The Court erred in its instructions to the jury when the jury returned to open court after the case had been submitted to them and during their deliberations.*

SUMMARY OF ARGUMENT

1. It is settled law in this jurisdiction that the doctors' affidavits procured and filed by the Appellee Hodson with and as a part of her verified lunacy petition against Mrs. Geare were admissible as admissions by reference and/or adoption. *General Finance, Inc.* v. *Stratford*, 71 U. S. App. D.C. 343, 109 F. 2d 843; *New York Life Insurance Co.* v. *Taylor*, 79 U.S. App. D.C. 66, 147 F. 2d 297.

The fact that the doctors could not be cross-examined did not make the affidavits inadmissible. *Milton* v. *U. S.*, 71 U. S. App. D.C. 394, 110 F 2d 556; 398; *General Finance, Inc.* v. *Stratford*, supra.

* Point No. 3 relates only to appeal No. 13,202.

The doctors' affidavits were relevant on the issues of mental capacity, fraud and deceit, undue influence, duress and coercion of the Appellee Hodson. They showed that Mrs. Geare was of weak and unsound mind and a person who could have been easily influenced. The facts that the affidavits were procured and filed by the Appellee Hodson in a lunacy proceeding filed by her against Mrs. Geare shortly after she had acquired title to Mrs. Geare's property and the principal item of her income, and a will in her favor, tended to show that Mrs. Geare was under the domination and control of the Appellee Hodson and tended to prove the allegations of fraud and deceit, undue influence, duress and coercion against her.

2. The factual statement of Mrs. Geare's illness, given by Appellee Hodson to the hospital doctor at Saint Elizabeths Hospital soon after Mrs. Geare's admission to that hospital was admissible in evidence under the Federal Shopbook Rule.

Said hospital record was made on the official hospital form by a hospital doctor for use by the hospital in determining the nature of the patient's mental illness, and is clearly admissible under the rule laid down by the Supreme Court in *Palmer v. Hoffman*, 318 U. S. 109, that a record made in the regular course of business and relating to and connected with the business is admissible under the Federal Shopbook Rule.

The hospital record is factual, and contains no matters of opinion such as would render it inadmissible under *New York Life Insurance Company v. Taylor*, 79 U.S. App. D.C. 66, 147 F. 2d 297.

The case of *Clainos v. United States*, 82 U.S. App. D.C. 278, 163 F. 2d 593, does not support the trial court's exclusion of the hospital record in question. This factual statement was not made extraneously, and later placed in the records, as was true in the Clainos case; but was

made by the hospital doctor at the hospital and immediately became a part of the hospital records.

The hospital record was relevant and material to the issues of mental capacity, and undue influence, duress and coercion exerted by Appellee Hodson over the testatrix; it also contains admissions inconsistent with Appellee Hodson's present position, and bears upon her credibility as a witness. The exclusion of this hospital record was highly prejudicial to Appellants' case and was reversible error.

3. The supplemental instructions given to the jury were coercive and were not of the kind generally employed and approved. *Allis* v. *United States*, 15 Sup.Ct. 36, 155 U.S. 117, 39 L. Ed. 91; *Allen* v. *United States*, 17 Sup. Ct. 154, 164 U. S. 492, 41 L.Ed. 528; *Commonwealth* v. *Tuey*, (Mass.), 8 Cush. 1; *State* v. *Smith*, 49 Conn. 376.

The type of instruction employed in this case has been condemned in similar circumstances; *St. Louis & S. F. R. Co.* v. *Bishard*, 147 F. 496; *Stewart* v. *United States*, 300 F. 769; *Chicago & E. I. Ry. Co.* v. *Sellars*, 5 F. 2d 31; *Berger* v. *United States*, 62 F. 2d 438; but has been approved where it is properly safeguarded by language which instructs the jury concerning the sanctity of their conscientious convictions; *Hill* v. *Wabash Ry. Co.*, 1 F. 2d 626; *Hoagland* v. *Chestnut Farms Dairy, Inc.*, 63 App. D.C. 357, 72 F. 2d 729.

The trial court erred in instructing the jury as it did, after the jury had indicated that it was a "hung" jury, and in telling the jury that a decision has to be reached by a jury "* * * and you are that jury," and in refusing the request of counsel for appellants to instruct the jury that no individual juror need give up his own convictions

ARGUMENT

Point No. 1. The District Court Erred in Excluding from the Evidence the Affidavits of Drs. Campbell and Cohen Filed by Appellee Hodson in Mental Health Case No. 600-54 (Plaintiffs' Exhibit No. 1).

It is settled law in this jurisdiction that where one person refers another to a third party for information in reference to an uncertain or disputed matter, the person making the reference is bound by the statements of the party to whom he has referred another, the same as though the statements were made by himself. This point was settled by this court in *General Finance, Inc.* v. *Stratford*, 71 U.S. App. D.C. 343, 109 F. 2d 843. In that case, General Finance, Inc., through its president, referred another to its bookkeeper for certain information. A witness to the bookkeeper's statements testified concerning the bookkeeper's statements. The bookkeeper's name was Hausenblaus. This court said, p. 343-344:

> "(1-3) Appellant objected to this testimony, and contends that the statements of Hausenblaus should have been excluded as hearsay. We think they were properly admitted against appellant, as admissions which appellant had authorized Hausenblaus to make in its behalf. 'Where one person is sent by another to a third party for information in reference to an uncertain or disputed matter, the person sending is bound by the declarations of the party to whom he was referred, as if they were made by himself'; i. e., they are admissible in evidence against him. Allen v. Killinger, 8 Wall. 480, 486, 487, 19 L.Ed. 470. 'The admissions of a third person are receivable in evidence against the party who has expressly referred another to him for information in regard to an uncertain or disputed fact.' Chapman v. Twitchell, 37 Me. 59, 62, 58 Am. Dec. 773. Drake v. Holbrook, 78 S.W. 158, 25 Ky. Law Rep. 1489, was an action for deceit in the sale of corporate stock. The trial court prevented plaintiff from testifying to statements about the corporation's affairs which the corporation's bookkeeper had made to plaintiff. It was held

that this evidence should have been admitted, because defendant had told the bookkeeper to show the books to plaintiff and tell plaintiff everything he wanted to know about them. In Skidmore v. Johnson, 70 N.J.L. 674, 57 A. 450, plaintiff had written a letter to defendant asking for payment of an alleged debt, and defendant had directed her daughter to write a reply, without telling her what to write or being told what she wrote. This letter was held admissible against the defendant. In Chadsey v. Greene, 24 Conn. 562, 571, defendant, in negotiating a sale to plaintiff, referred plaintiff to a neighbor for information regarding defendant's character and responsibility. What the neighbor said to plaintiff was received in evidence. Cf. Wigmore, Evidence, 2 Ed., §§ 1069, 1070. Hausenblaus was a witness at the trial, and appellant could have examined him on his admissions if it had cared to do so. Moreover, the effect of the doctrine of admissions is to dispense with the requirement of cross-examination. A party has no need to cross-examine himself, and he seldom has need to cross-examine those whom he has authorized to speak for him. Usually, as in this case, he can do so if he chooses.

"We need not decide whether the statements of Hausenblaus would have been admissible, because he was appellant's agent, even if he had not been detailed by appellant's president to go over the books with appellee's counsel."

New York Life Insurance Co. v. *Taylor*, 79 U.S. App. D.C. 66, 147 Fed. (2nd) 297, involved an action on a life insurance policy to recover double indemnity on the ground of accidental death. This court said, p. 68:

"The first error claimed is that the trial court excluded the statement of a physician which was part of the proofs of death required to be furnished by the beneficiary. . . . . .

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[1] Cf. *Pan-American Petroleum & Transport Company* v. *United States*, 273 U.S. 456, 499, 47 S. Ct. 416, 71 L.Ed. 734; *Takahashi* v. *Hecht Company*, 60 App. D.C. 176, 178, 50 F.2d 326; Wigmore, Evidence, 2 Ed., § 1078.

"....."

"(1-2) * * * Ordinarily a statement by a physician submitted by the beneficiary of a policy as part of the proofs of death is admissible to show the manner of death.[2] Its admissibility is based on the fact that the beneficiary whose duty it is to furnish the proofs of death must be presumed to have authorized the statements made in those proofs. If later at the trial she takes a position inconsistent with the proofs of death which she has submitted those statements are admissible as her representations. As the Supreme Court said in the case of Mutual Life Ins. Co. of Newark, N. J. v. Newton,[3]:

"'* * * the proofs presented were admissible as representations on the part of the party for whose benefit the policies were taken, as to the death and the manner of the death of the insured. They were presented to the company in compliance with the condition of the policy requiring notice and proof of the death of the insured as preliminary to the payment of the insurance money. They were intended for the action of the company, and upon their truth the company had a right to rely. Unless corrected for mistake, the insured was bound by them. Good faith and fair dealing required that she should be held to representations deliberately made until it was shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained.'

"(3-5) It is apparent from the above opinion that proofs of death are competent evidence of the cause of death only where the relevant statements contained therein are authorized by the beneficiary.[4] The fact that the beneficiary submitted the proofs to the

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[2] *Wetmore* v. *Travelers' Protective Ass'n.*, 10 Cir., 1933, 64 F.2d 435.

[3] 1875, 22 Wall. 32, 35, 22 L.Ed. 793.

[4] 'Where the beneficiary in an insurance policy files as a part of the proofs of death such a certificate as this, under the circumstances of this case it amounts to an approval by him of the statements in it as correct and should be received in evidence against him as an admission by adoption. 2 Wigmore, Evidence, 2d Ed., § 1073, p. 570.' *Russo* v. *Metropolitan Life Ins. Co.*, 1939, 125 Conn. 132, 3 A.2d 844, 846.

insurance company creates a presumption that the statements were authorized. * * *."

Even lack of opportunity to cross-examine the doctors would not have rendered their affidavits inadmissible. Their affidavits were procured and filed by the Appellee Hodson and constituted a part of her verified petition in the lunacy proceeding of Dorothy Smallwood Geare. In *Milton* v. *United States*, 71 U.S. App. D.C. 394, 110 Fed. (2nd) 556, this court said, p. 398:

> "(7-10) When evidence is offered to prove an admission—unlike the situation when it is offered as secondary evidence to prove statements of dead or absent witnesses[12]—there is no requirement that opportunity should have been given for cross-examination[13] and, consequently, no requirement of identity of issues.[14] Admissions have probative value not because they have been subjected to cross-examination and therefore satisfy the hearsay rule, but because they are statements by a party opponent, inconsistent with his present position as expressed in his pleadings and testimony.[15] It is not even necessary that such evidence should have been given in a courtroom or under oath.[16] The fact, that it was so given in the present case, however, does not detract from its admissibility.[17] * * *."

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[12] See 3 Wigmore, Evidence (2d Ed. 1923) §§ 1386, 1387.

[13] 2 Wigmore, Evidence (2d Ed. 1923) § 1048. See *General Finance Inc.* v. *Stratford*, (No. 7346, decided January 29, 1940) 71 App. D.C. 343, 109 F.2d 843.

[14] 3 Wigmore, Evidence (2d Ed. 1923) § 1387(3); *State* v. *Longstreth*, 19 N.D. 268, 276, 121 N.W. 1114, 1117, Ann. Cas. 1912D, 1317; *People* v. *Butler*, 111 Mich. 483, 69 N.W. 734; *State* v. *Willis*, 71 Conn. 293, 41 A. 820; 2 Bishop's New Criminal Procedure (2d Ed. 1913) § 1255.

[15] 2 Wigmore, Evidence (2d Ed. 1923) §§ 1048 (3), 1049, 1050.

[16] See *Miles* v. *United States*, 103 U.S. 304, 308, 311, 26 L.Ed. 481; *Sinclair* v. *District of Columbia*, 20 App. D.C. 336, 338, 339, appeal dismissed, 192 U.S. 16, 24 S. Ct. 212, 48 L.Ed. 322; *O'Neill* v. *United States*, 8 Cir., 19 F. 2d 322, 325; *Müller* v. *United States*, 7 Cir., 53 F.2d 316. See also, *Wilson* v. *United States*, 162 U.S. 613, 16 S. Ct. 895, 40 L.Ed. 1090.

[17] *Henderson* v. *State*, 95 Ga. 326, 329, 22 S.E. 537, 538; *Macomber* v. *Bigelow*, 126 Cal. 9, 16, 58 P. 312, 315; *State* v. *Hopkins*, 13 Wash. 5, 42 P. 627; *Rafferty* v. *State*, 91 Tenn. 655, 665, 666, 16 S.W. 728, 730.

Obviously, the doctors' affidavits were relevant on the issues of mental capacity, fraud and deceit, and undue influence, duress and coercion. They showed that Dorothy Smallwood Geare was of unsound mind. They also showed that she, being of weak and unsound mind, was a person susceptible to fraud and deceit and undue influence. The facts that the Appellee Hodson filed a petition to have Mrs. Geare adjudged to be a person of unsound mind and accompanied her petition with affidavits of doctors who had examined and observed Mrs. Geare, including her attending physician for a period of more than a year, tend to show that Mrs. Geare was under the domination and control of the Appellee Hodson and susceptible to duress and coercion. Those facts also tend to show that confidential relations existed between Mrs. Geare and Appellee Hodson.

It follows that because of the erroneous exclusion of the doctors' affidavits, the appellants are entitled to a new trial on the issues of (1) mental capacity, (2) fraud and deceit, and (3) undue influence, duress and coercion.

Point No. 2. The District Court Erred in Excluding from the Evidence the Records of Saint Elizabeths Hospital (Plaintiffs' Exhibit 14).

Mrs. Geare was admitted to Saint Elizabeths Hospital on April 30, 1954, on the petition for a Writ De Lunatico Inquirendo filed by Appellee Hodson. The factual statement was taken by the hospital doctor from Appellee Hodson on May 6, 1954 (App. 32-33).

The Court will notice that the statement was made on an official hospital form designated "Clinical Record" and "Report on Information," by a member of the hospital staff, at the hospital, soon after the admission of Mrs. Geare. It is the customary factual statement usually taken from a friend or relative upon the admission of any patient in the regular course of the business of a hospital, for use

by the hospital in determining the nature of the patient's illness.

The trial court excluded this factual statement from the evidence, citing in support of its action, *New York Life Insurance Company* v. *Taylor*, 79 U.S. App. D.C. 66, 147 F.2d 297 and *Clainos* v. *United States*, 82 U.S. App. D.C. 278, 163 F.(2d) 593. We have assigned this action of the trial court as error, and contend that these cases do not support the court's action. This factual statement is clearly admissible under the Federal Shopbook Rule, (U.S.C.A., Title 28, Sec. 1732). See "Statutes Involved," supra.

The purpose of this statute was to change the old common law rule requiring the person who made the entries to be produced as a witness to identify them, so that records could be admitted in evidence, irrespective of the death or unavailability of the person making them.

In *Palmer* v. *Hoffman* (N.Y. 1943), 318 U.S. 109, 87 L. Ed. 645, rehearing denied 318 U.S. 800, 87 L. Ed. 1163, the Supreme Court held that an accident report of a railroad engineer giving his version of an accident to a railroad official was not admissible in evidence, because the report was not connected with the business of running the railroad. In construing the above statute the Court said (318 U. S. 115):

> "The several hundred years of history behind the Act (Wigmore, supra, §§1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But 'regular course' of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business."

In that case the Court simply held that to come under the Shopbook Rule the statement must not only be made

in the regular course of business, but it must also be connected with the conduct of the business.

New York Life Insurance Company v. *Taylor* (1944), 79 U.S. App. D.C. 66, 147 F. 2d 297 does not contain authority for the exclusion of the factual statement in question. In that case it was sought to have introduced in evidence hospital records containing the opinions of the hospital doctors—not mere factual matters—who treated the patient while at the hospital, to show suicidal intent. In passing on these records, this Court stated (p. 69):

> "In this case the records are not offered to prove routine facts such as the date of admission to the hospital, the names of the attending physicians, etc. They are offered to prove the truth of accounts of events and of complicated medical and psychiatric diagnosis. The accuracy of such accounts is affected by bias, judgment, and memory; they are not the routine product of an efficient clerical system. There is here lacking any internal check on the reliability of the records in this respect, such as that provided for 'payrolls, accounts receivable, accounts payable, bills of lading and the like.' The Supreme Court has stated that the test of admissibility must be 'the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation.' *Palmer* v. *Hoffman*, supra, p. 114."

This Court simply held that the opinions of the hospital doctors, their diagnoses, etc., upon which competent men would differ, and which would "depend on opinion or conjecture;" would not be admissible. However, the Court clearly stated that hospital records of the following nature would be properly admissible (p. 72):

> "The records offered here are not the kind of entries which are admissible under the established principles of the Shop Book exception to the hearsay rule. Such records must be those which are a product of routine procedure and whose accuracy is substantially guaranteed by the fact that the record is an automatic re-

flection of observations. This obviously excludes those which depend on opinion or conjecture. The internal check on the reliability of admissible records comes from two sources: (1) an efficient clerical system, and (2) the fact that they are the kind of observations on which competent men would not differ. * * *"

"Hospital records are no different from any other kind of records kept in the regular course of business. They must be subjected to the same tests as to subject matter. Regularly recorded facts as to the patient's condition or treatment on which the observations of competent physicians would not differ are of the same character as records of sales or payrolls. Thus, a routine examination of a patient on admission to a hospital stating that he had no external injuries is admissible. An observation that there was a deviation of the nasal septum is admissible. Likewise, an observation that the patient was well under the influence of alcohol. * * *"

See *Ulm* v. *Moore—McCormack Lines*, CCA (2d Cir.) NY 1940, 115 F. 2d 492, cert. den. 313 U.S. 567, 85 L. Ed. 1525; *Reed* v. *Order of United Commercial Travelers of America*, (2d Cir.) CCA NY 1941, 123 F. 2d 252; *Pollack* v. *Metropolitan Life Insurance Co.*, CCA (3d Cir.) NJ 1943, 138 F. 2d 123; *Tucker* v. *Loew's Theatre & Realty Corp.*, CCA (2d Cir.) NY 1945, 149 F. 2d 677; *Williams* v. *Overholser*, (1945), 80 U.S. App. D.C. 235, 151 F. 2d 457, cert. den. 327 U.S. 808, 90 L. Ed. 1032; *Woodward* v. *United States* (1950) CCA (8th Cir.) Mo. 1950, 185 F. 2d 134, reversed on other grounds, 341 U.S. 112, 95 L. Ed. 670.

It is evident from these decisions that hospital records consisting of *factual matters* relating to the patient's condition, where there could be no question of their trustworthiness or reliability, would be admissible in evidence. The facts recorded by the hospital doctor soon after the admission of Mrs. Geare, were within the knowledge of the informant, Appellee Hodson, who had observed the conduct of the patient from the inception of her mental illness, Mrs. Geare having lived with Appellee Hodson for

13 years. The factual data given by Appellee Hodson to the hospital doctor in the regular course of the hospital's business, clearly related to the business of the hospital and particularly to the business of the hospital in treating this patient. This factual statement meets the test of reliability and imports trustworthiness. As noted on the statement (App. 32-34): "The information appears to be valid. * * * The patient has been living with the informant for the last 13 years."

We believe that this factual statement is clearly admissible under the decision of this Court in the *Taylor* Case. See also the vigorous dissent by Associate Justice Edgerton, who expressed the opinion that all of the hospital records offered in evidence in the *Taylor* Case were properly admissible under the rule established by the Supreme Court in *Palmer* v. *Hoffman*, supra.

The trial court further cited *Clianos* v. *United States* (1947), 163 F. 2d 593, 82 U.S. App. D.C. 278, in refusing to admit this factual statement. In that case a photograph with notations on the back of prior convictions was admitted in evidence. The photograph was not one made by the Police Department in the regular course of its business, but was, later placed in the records of that department. This Court stated with reference to the Shop Book Rule (82 U.S. App. D.C. 280):

> "* * * That Rule is confined to records kept in the course of the business of which the transaction was a part. It does not refer to an external record which might happen to have been kept by a person outside that business. * * * The Rule contemplates that certain events are regularly recorded as 'routine reflections of the day to day operation of a business' so that 'the character' of the records and their earmarks of reliability' import 'trustworthiness.' Thus, the recordation becomes a reliable recitation of the fact. * * *"

The Clianos case merely follows the rule laid down in *Palmer* v. *Hoffman*, supra; and would not be authority for

the exclusion of the factual statement in question, which was made in the regular course of the business of the hospital and connected with the business of the hospital.

In *Ulm* v. *Moore—McCormack Lines*, supra, the Circuit Court of Appeals, Second Circuit, held that records of a Government hospital made at the time of admission of the patient to the hospital and relating to the nature and extent of injuries, and also records of his hospitalization at a prior time, were admissible under the Shopbook Rule, as bearing upon the credibility of plaintiff as a witness, and upon the question whether certain injuries therein claimed had resulted from a fall, or had actually been received at a prior date.

In *Wickman* v. *Bohle* (1938), 173 Md. 694, 196 A. 326, a hospital record, made when a boy who had been struck by an automobile while he was riding a bicycle, returned to the hospital for a second treatment two weeks after the accident, stating that the history of the case was that of "a fractured clavicle two weeks prior to his admission," was held to be admissible under a similar Maryland statute where it was made by an intern of the staff in the course of his regular duties at the hospital.

The factual statement excluded by the trial judge in this case was extremely material and relevant to Appellants' case, for it had a direct bearing particularly upon the issues of (1) the mental capacity of the testatrix, (2) whether Appellee Hodson procured the will of deceased by undue influence, duress, or coercion, and (3) whether a confidential relationship existed between Appellee Hodson and deceased. The statement contains admissions made by Appellee Hodson in her effort to have Mrs. Geare committed to Saint Elizabeths Hospital for mental treatment not long after she had procured from Mrs. Geare the deed and will in dispute, which admissions are wholly inconsistent with her present position; and it bears upon the credibility of Appellee Hodson as a witness. This hospital

record may well have been a deciding factor, when coupled with the other evidence in the record, in the minds of the jury in arriving at a different verdict in the case. The exclusion of this hospital record was clearly prejudicial to Appellants' case.

For the reasons set forth above we submit that the trial court's action in excluding the statement was plainly in error.

Point No. 3. The District Court Erred in its Instructions to the Jury When the Jury Returned to Open Court After the Case Had Been Submitted to Them and During Their Deliberations.

The supplemental instructions given to the jury by the trial court were coercive and tended to force the members of the jury to reach a verdict without a view to the sanctity of their individual, conscientious convictions, and without regard to their duties as jurors under their oaths, and constituted reversible error.

The Supreme Court of the United States apparently first considered supplemental instructions to the jury in the nature of those in question here in the case of *Allis* v. *United States*, 15 Sup. Ct. 36, 155 U.S. 117, 39 L. Ed. 91. The supplemental charge given by Circuit Judge Walter H. Sanborn at the trial of the case is set out in *United States* v *Allis*, 73 F. 163, at page 182. The charge was impressed upon the minds of the jurors on only one occasion, after the jury had deliberated for twenty-four hours. The charge included the following language:

> "The court does not desire that any juror should surrender his conscientious convictions. On the other hand, each juror should perform his duty conscientiously and honestly, according to the law and the evidence. And, although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring 12 minds to a unanimous result, you must examine the questions submitted to you with candor, and with a

proper regard and deference to the opinions of each other."

The charge continued with an explanation of the duties of the jurors in consulting together, in language similar to the language employed in this case by the trial court. The Supreme Court approved of the action of the trial court in recalling the jury after they had been in deliberation and assisting them in the solution of any difficulties, without making reference to any of the wording contained in the instructions. In fact, such comment was unnecessary, because the instruction was sufficiently guarded by the language quoted above.

A similar supplemental instruction came to the attention of the Supreme Court in the celebrated case of *Allen* v. *United States*, 17 Sup. Ct. 154, 164 U.S. 492, 41 L. Ed. 528. The charge itself, as given by the trial court, is not reported, but has nevertheless become a legend. In the opinion, written by Mr. Justice Brown, the supplementary instructions were paraphrased; and it is stated in the opinion that the instructions were taken literally from a charge in a criminal case which had been approved by the Supreme Court of Massachusetts in *Commonwealth* v. *Tuey*, 8 Cush. 1, and by the Supreme Court of Connecticut in *State* v. *Smith*, 49 Conn. 376. In *Commonwealth* v. *Tuey*, supra, the court employed the exact language quoted above from the *Allis* case. It appears from the opinion in *Commonwealth* v. *Tuey*, supra, that the supplementary instruction was given only once. *In State* v. *Smith*, supra, the charge given by the trial court is not reported, but the court expressly stated that the charge to the jury was substantially the same as that stated to the jury in *Commonwealth* v. *Tuey;* and it does not appear that the instruction was given more than once.

The present case is not one wherein the jury were instructed only once in the manner questioned. Here the

jury were repeatedly impressed with the supplemental instruction (App. 40-45).

In 1906, in *St. Louis & S. F. R. Co.* v. *Bishard*, 147 F. 496, the Circuit Court of Appeals of the Eighth Circuit ruled that a supplementary instruction somewhat similar to the so-called "Allen" charge was erroneously given, after reviewing *United States* v. *Allis*, supra and *Allen* v. *United States*, supra. One of the three judges deciding the case on appeal was the same circuit judge, Walter H. Sanborn, who had given the properly guarded charge to the jury in the trial of *United States* v. *Allis*, supra. In that case, it appears that the supplementary charge to the jury was given only once, but it did not include the language previously quoted from *United States* v. *Allis*, supra, and *Commonwealth* v. *Tuey*, supra, relating to the conscientious convictions of the jurors. After reviewing the *Allis* case, the *Allen* case, and *Burton* v. *United States*, 196 U.S. 283, 25 S. Ct. 243, 49 L. Ed. 482, the court held that the supplementary charge to the jury was not sufficiently guarded, and that its "* * * tendency was to bring the one juror to an agreement with the others even against the dictates of his own judgment." Whereupon, the judgment was reversed, and the cause remanded for a new trial.

In 1924, the same circuit judge, Walter H. Sanborn, delivered the opinion of the Circuit Court of Appeals of the Eighth Circuit, in *Stewart* v. *United States*, 300 F. 769, holding that the supplemental instruction given was error, in that it had too strong a tendency toward coercion of the minority of the jury. In that case, the supplemental charge included the reading of an excerpt from the opinion of the Supreme Court in *Allen* v. *United States*, supra. Circuit Judge Sanborn, at page 785 of the opinion, referring to the *Allen* case, stated:

> "The excerpt from that opinion was not any part of the charge to the jury in that case, nor did the Supreme Court recommend that excerpt as a fit charge

to the jury under such circumstances as existed in that case or in this."

He then referred to the supplemental charge given to the jury in *United States* v. *Allis*, supra, and its approval in the *Bishard* case, supra, stating that, "If the court below had given that charge, it would have avoided the question now under consideration." The opinion then quotes the paragraph from the opinion in the Allen case, which was read to the jury, and stated:

> "This paragraph of the opinion in Allen's Case, as we have said, was no part of the charge of the court in that case, but it was a part of the argument of the Supreme Court in support of the standard and approved charge in that case, and it was intended to show the absurdity of a stubborn refusal by a juror to listen to the arguments of his fellows, or to consider anything but the conclusion he had reached before the jury retired to deliberate. There was no evidence in this case that any juror had not listened with deference to the arguments of the majority, or that any juror went to the jury room with a blind determination that the verdict should represent his opinion of the case at the time he entered that room, or that any juror had closed his ears to the arguments of men who were equally honest and intelligent with himself."

Judge Sanborn's opinion concerning this part of the appeal in *Stewart* v. *United States* concludes with a statement that "* * * the supplemental charge and especially the excerpt from the opinion in Allen's Case were more than a slight thing, and our conclusion is that they bore too hard upon the convictions of the minority of the jury, and that an impartial and fair administration of justice will be served by a new trial of this case."

In the present case this Court is presented with a situation very nearly the same as that in the *Stewart* case, supra. Here there is no evidence of any juror or jurors stubbornly refusing to engage in the proper deliberative functions and

efforts of the jury. Another similarity lies in the fact that in the present case the trial court did not employ an approved supplemental instruction as such; but rather, it used the most coercive and humbling segments of an approved charge repeatedly (App. 40-45), and with emphasis, without referring even once to the language which guarded the instruction in the *Allis* case, supra. The trial court further denied the specific request of appellants' counsel to include this guarding language in the final supplementary instruction. (App. 46)

In *Hill* v. *Wabash Ry. Co.*, 1 F. 2d 626, the Circuit Court of Appeals of the Eighth Circuit was again confronted with the question of a supplemental instruction to the jury; but this time in a civil case. Here the instruction was held to be not erroneous, inasmuch as it was essentially the same instruction as was given by Judge Sanborn in the *Allis* case, supra. The Court went on to say:

> "The court has no right to coerce a jury into a verdict, or to attempt to do so. The important thing in a case is not the mere agreement of the jury, but the correct determination of the issue involved. All parties to the controversy are entitled to the uncoerced judgment of the jurymen, and the test of such an instruction as herein complained of is whether it is in fact an attempt to assist the jury or to coerce them. If it is an attempt to break down the individual judgment and honest conviction of a juryman in order merely to reach a verdict, it is erroneous; * * * Courts should be careful not to infringe upon the jury's prerogatives as triers of fact questions, and not attempt to induce jurors to give up their individual judgment on a fact question by creating the impression that such is the desire of the court."

In *Chicago & E. I. Ry. Co.* v. *Sellars*, 5 F. 2d 31, the Circuit Court of Appeals of the Eighth Circuit again condemned the use of the excerpt from the Supreme Court opinion in the *Allen* case, supra, holding that it was reversible error to include this extract in the supplementary

charge. The court took particular note of its decision in *Hill* v. *Wabash Ry. Co.*, supra, and stated that the rule laid down in the latter case also condemned the instruction under consideration there.

In *Berger* v. *United States*, 62 F. 2d 438, the Circuit Court of Appeals of the Tenth Circuit condemned the use of a supplementary instruction to the jury because, among other things, it failed to state that it is the duty of each juror to perform his duty honestly and conscientiously according to the law and evidence and not to surrender his consientious convictions. The court there stated, at page 440: "An approved charge, so safeguarded, may be found in *United States* v. *Allis*, (C. C. Kan.) 73 F. 165."

In *Hoagland* v. *Chestnut Farms Dairy, Inc.*, 63 App. D.C. 357, 72 F. 2d 79, it appeared that the so-called "Allen charge," taken from language of the opinion of the Supreme Court, was given to the jury only once, and that the court specifically cautioned the jury at the same time by saying, "None of you should return a verdict against your conscientious views". In that case, this court held that there was no error in the procedure of giving this supplementary charge to the jury.

It is manifestly true that when a trial court is faced with the problem of guiding a jury which has indicated that it is a "hung" jury, a grave duty arises to guard the fundamentals of our jury system with greater care than at any other time. In the trial of this will contest in the District Court, a relatively ascertainable minority was beseeched by the Court, and subjected to extreme psychological pressure by the jury foreman (App. 45, 46), to give up the opinions which were causing that minority to disagree with the majority, after the foreman had announced that the jury appeared to be a "hung" jury (App. 40). Indeed, after this announcement by the jury, *the jury heard six times*, words to the effect that "* * * you must endeavor to reach an agreement." (App. 40, twice; App. 42 once; App.

45, three times); they were told of the length of the trial, that there was considerable cost to the taxpayers, and that the case should be decided, on three occasions (App. 40, 42-43, 46); they heard that they should reach a verdict "promptly," or "very shortly" four times (App. 40, 41, 46, 47); they were told that a jury would have to decide the case, and that they should be that jury twice (App. 40, 42-43); and they were told on one occasion:

"And a decision has to be reached by a jury, *and you are that jury*" (emphasis supplied) (App. 45)

Following this latter statement, the jury retired and returned with a verdict in three minutes.

The cumulative effect of the wording in the instructions referred to was to humble and coerce the minority into the position where individual conscientious convictions were abandoned. In this abandonment, the minority was not guided by a proper charge as it was in *Hoagland* v. *Chestnut Farms Dairy*, supra. On the contrary, the Court refused to so guide the jury.

The total length of time during which the jury deliberated was approximately ten hours and twenty-three minutes. The jury were given the so-called "Allen Charge", on the first occasion, after only six hours and five minutes of deliberation; on the second occasion after only forty-five more minutes of deliberation; and again following three hours and fifteen minutes more. On the third occasion the charge, coupled with the admonition that "you are that jury" to decide the case, took its toll. The three minutes during which the jury were out were barely adequate to allow the minority to exclaim "I give up."

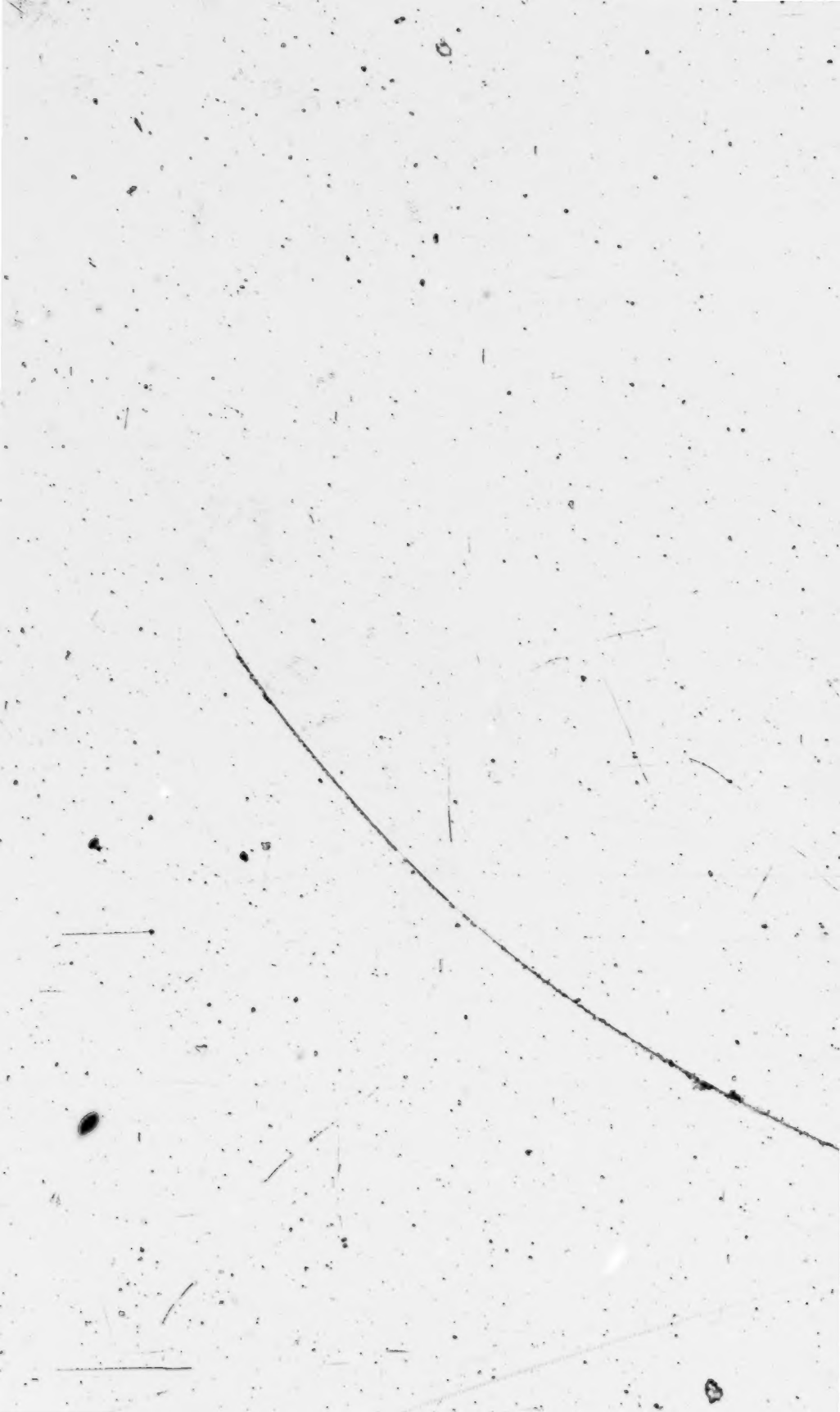
It follows that, because of the erroneous instructions to the jury, the appellants are entitled to a new trial on the issues of (1) revocation, and (2) undue influence, duress and coercion.

CONCLUSION

For the reason that the District Court erred in excluding from evidence the affidavits of Doctor Campbell and Doctor Cohen, the appellants are entitled to a new trial in both cases upon the issues of (1) mental capacity, (2) fraud and deceit, (3) undue influence, duress and coercion, and, in the will case, (4) whether the will in question was the last will and testament of Dorothy Smallwood Geare. For the reason that the District Court erred in excluding from evidence the records of Saint Elizabeths Hospital, the appellants are entitled to a new trial in both cases on all of the issues as stated above. For the reason that the District Court erred in its instructions to the jury after the case was submitted to the jury and during their deliberations, the appellants are entitled to a new trial in the will case on the issues of (1) undue influence, duress and coercion, (2) revocation, and (3) whether the will in question was the last will and testament of Dorothy Smallwood Geare.

Respectfully submitted,

ARTHUR J. HILLAND
PAUL M. NIEBELL
THOMAS N. KINDNESS
Attorneys for Appellants



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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,201 and 13,202

GRAHAME THOMAS SMALLWOOD, JR., et al.,
Appellants

v.

VIOLA A. HODSON, et al., *Appellees*

Appeal from United States District Court for the District of Columbia

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APPENDIX

Filed March 11, 1955

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1098-'55

GRAHAME THOMAS SMALLWOOD, JR., 3200 Sixteenth Street, Northwest, Washington, D. C.,

ELIZABETH S. WIER, 1900 F Street, Northwest, Washington, D. C., and

ELEANOR S. BEASLEY, 3200 Sixteenth Street, Northwest, Washington, D. C., *Defendant.*

vs.

VIOLA A. HODSON, 1805 Quincy Street, Northwest, Washington, D. C., *Defendants.*

Complaint to Set Aside Conveyance and to Require Reconveyance of Real Estate and for Accounting and Money Judgment

1. Jurisdiction is founded on Section 11-306, of the District of Columbia Code, 1951 Edition.

2. On or about the 28th day of December, 1954, one Dorothy Smallwood Geare died leaving surviving her as her only heirs at law and next of kin the plaintiffs herein who were her nephew and nieces.

3. During her lifetime, the said Dorothy Smallwood Geare was seized of the following real estate in the District of Columbia, to wit: Lot 83 in Square 2061, with improvements thereon known as 3047 Porter Street, Northwest, Washington, D. C.

4. On or about the 14th day of April, 1954, a deed purporting to have been executed on or about the 2d day of February, 1954, by the said Dorthy Smallwood Geare and

purporting to convey all of the above-described real property to the defendant, Viola A. Hodson, was recorded among the land records of the District of Columbia in the office of the Recorder of Deeds, in Liber 10174 at Folio 417.

5. At the time of the purported execution and delivery of the said deed and for some time prior thereto, the said Dorothy Smallwood Geare was unable to care for her person, she was incapable of managing her own affairs, she was confused and disoriented, she was not of sound mind and memory and was not capable of making a valid deed or contract.

6. At the time of the purported execution and delivery of the said deed and for some time prior thereto, the said Dorothy Smallwood Geare was living with and was under the domination and control of the defendant and members of her family and household and a confidential relationship existed between her and the defendant, and the purported execution and delivery of the said deed by Dorothy Smallwood Geare were obtained and procured without any consideration and as a result of fraud, deceit, duress, coersion and or undue influence exercised upon her by the defendant or some other person or persons unknown to the plaintiffs.

7. At the time of the purported execution and delivery of the said deed, the above-described real property was subject to a certain deed of trust dated the 3rd day of May, 1946, and recorded the 8th day of May, 1946 in Liber 8264 at Folio 173 of the land records of the District of Columbia, securing payment of an unpaid balance of approximately $5,095.65 including interest of an indebtedness in the original amount of $9,000.00, and on or about July 13, 1954, the defendant paid the said balance of $5,095.65, including accrued interest, from and out of the proceeds of a new loan in the amount of $9,000.00 procured by her and secured by a certain deed of trust on

the above-described real property dated the 8th day of July, 1954, and recorded on the 9th day of July,
3 1954, in Liber 10226 at Folio 475 of the land records of the District of Columbia and as a result the defendant has converted to her own use approximately $4,000.00 of the equity in said real property and, in addition thereto, has received the rents and profits from said real property for a long period of time, the exact period of time and amounts of rents and profits being unknown to the plaintiffs.

8. A certain paper writing also bearing the same date as the said deed; namely, the 2d day of February, 1954, has been filed in the office of the Register of Wills for the District of Columbia, purporting to be the last will and testament of the said Dorothy Smallwood Geare, and a petition for probate of the said will and for letters testamentary have been filed in the probate branch of this court by the defendant herein, the same being Administration No. 87018.

9. A petition for caveat has been filed in the probate branch of this court by the plaintiffs, contesting the probate and validity of the said paper writing. In the event the said paper writing dated the 2d day of February, 1954, is not admitted to probate and record as the last will and testament of the said Dorothy Smallwood Geare, deceased, the above-described real property will descend by operation of law to the plaintiffs.

WHEREFORE, plaintiffs demand judgment for relief as follows:

1. That the deed described in paragraph 4 of this complaint be adjudged null and void and of no effect, except as to the party secured and the trustees named in the deed of trust on the said real property dated the 8th day of July, 1954, and recorded on the 9th day of July, 1954, in Liber 10226 at Folio 475, referred to in paragraph 7 of this complaint, their successors and or assigns.

2. That the defendant be ordered and directed to convey the said real property to the plaintiffs, or that a trustee or trustees be appointed to so convey the said real property.

4 3. That the defendant be ordered and directed to account herein for the difference between the amount of the encumbrance on the said real property on February 2, 1954, and the amount or amounts placed thereon by her.

4. That the defendant be ordered and directed to account herein for the rents and profits from the said real property.

5. That the plaintiffs recover of and from the defendants the difference between the amount of the encumbrance on the said real property on February 2, 1954, and the amount or amounts placed thereon by the defendant and for the rents and profits from the said real property collected by the defendant, and that plaintiffs have execution thereof.

6. And for such other and further relief as to the court may seem meet and proper, the exigencies of the case may require, and the evidence may show the plaintiffs to be entitled.

---

5 Filed June 2, 1955

Answer of Defendant

FIRST DEFENSE

The allegations of the Complaint filed herein fail to state a cause of action for which relief can be granted.

SECOND DEFENSE

Defendant admits the allegations in Paragraphs 1, 2, 3 and 4 of the Complaint.

Defendant admits that Dorothy Smallwood Geare was living with defendant at the time of the execution and delivery of the deed which is the subject of this litigation, but denies all the other allegations of Paragraphs 5 and 6 of the Complaint.

Defendant admits the allegations in Paragraph 7 of the Complaint, but denies the alleged conversion.

Defendant admits the allegations in Paragraphs 8 and 9 of the Complaint.

---

8 Filed June 27, 1955

Order Granting Motion to Consolidate for Joint Trial With Issues Pending in Administration No. 87018

This action came on to be heard upon the motion filed herein by the plaintiffs to consolidate the above-entitled action for a joint trial with the issues pending before the court in Administration No. 87018, entitled In Re Estate of Dorothy Smallwood Geare, Deceased, and thereupon, upon consideration thereof, it is, by the Court, this 27th day of June, 1955, adjudged as follows:

That the said motion be, and the same hereby is, granted and a joint trial of the above-entitled action with the issues pending before the Court in Administration No. 87018, entitled In Re Estate of Dorothy Smallwood Geare, Deceased, is hereby ordered.

R. B. Keech
Judge

---

10 Filed June 27, 1955

Order

This cause came on for hearing on the Motion of Margaret Hynson Studt for Leave to Intervene as a party defendant, and upon consideration thereof, it is by the Court, this 27 day of June, 1955

Ordered, that Intervener's Motion be, and it is hereby granted that the Intervener be named as a party defendant.

R. B. Keech
Judge

11 Filed Aug. 10, 1955

Answer of Defendant

First Defense

The allegations of the Complaint filed herein fail to state a cause of action for which relief can be granted.

Second Defense

Defendant admits the allegations in Paragraphs 1, 2, 3 and 4 of the Complaint.

Defendant admits that Dorothy Smallwood Geare was living with defendant at the time of the execution and delivery of the deed which is the subject of this litigation, but denies all the other allegations of Paragraphs 5 and 6 of the Complaint.

Defendant admits the allegations in Paragraph 7 of the Complaint, but denies the alleged conversion.

Defendant admits the allegations in Paragraphs 8 and 9 of the Complaint.

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14 Filed Dec. 9, 1955

Findings of Fact and Conclusions of Law

FINDINGS OF FACT

The Court finds that this Court has jurisdiction under Section 11-306 et. seq. of the District of Columbia Code (1951 Ed.); that the amount in controversy exceeds, exclusive of costs, the sum of $3,000.00; that Dorothy Smallwood Geare died a resident of the District of Columbia on December 28, 1954; that on February 2, 1954 Dorothy Smallwood Geare executed, acknowledged and delivered to Viola A. Hodson a deed to the following described real estate in the District of Columbia: Lot 83, in Square 2061, with improvements thereon known as 3047 Porter Street, N. W.; that Dorothy Smallwood Geare had sufficient mental

capacity to execute, acknowledge and deliver such deed; that the execution of the deed was not procured by any undue influence or fraud.

CONCLUSIONS OF LAW

1. The conveyance dated February 2, 1954, of premises 3047 Porter Street, Northwest, in the District of Columbia, from Dorothy Smallwood Geare, grantor, to Viola A. Hodson grantee, is valid, and no accounting is required by defendants to plaintiffs.

15 2. Defendants are entitled to judgment in their favor on the complaint filed herein with costs to be assessed against plaintiffs.

ALEXANDER HOLTZOFF
Alexander Holtzoff
Judge

December 9, 1955

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16 Filed Dec. 9, 1955

Judgment

Upon consideration of the Complaint to Set Aside Conveyance and to Require Reconveyance of Real Estate and for Accounting and Money Judgment, and the Answers of defendants filed herein, and after trial by the Court without a jury on the issues involved, and due consideration of evidence presented in open Court, ~~including three witnesses and seventeen exhibits for the plaintiffs and thirteen witnesses and six exhibits for the defendants,~~ the trial proceeding on the following days, October 26, 27, 28, and 31 and November 1 and 2, 1955, and the Court having ~~carefully reviewed and considered all of the foregoing and having~~ entered herein its findings of fact and conclusions of law ~~as to the lawful and proper determination of the issues~~ herein, it is by the Court this 9 day of December, 1955

ADJUDGED, ORDERED AND DECREED that the Deed dated February 2, 1954 conveying Lot 83 in Square 2061, known as 3047 Porter Street, N. W., Washington, D. C. from Dorothy Smallwood Geare, Grantor to Viola A. Hodson, Grantee, is valid and it is further

ORDERED that no accounting is required by defendants to plaintiffs, and it is further

17 ORDERED that the relief prayed for in said complaint is denied and judgment is hereby entered for the defendants with costs against the plaintiffs.

ALEXANDER HOLTZOFF
Alexander Holtzoff,
Judge

---

18 Filed Dec. 28, 1955

Notice of Appeal

Notice is hereby given this 28th day of December, 1955, that the plaintiffs Grahame Thomas Smallwood, Jr., Elizabeth S. Wier and Eleanor B. Niebell, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 9th day of December, 1955 in favor of the defendant, Viola A. Hodson and the intervening defendant, Margaret Hynson Studt, against said plaintiffs, Grahame Thomas Smallwood, Jr., Elizabeth S. Wier and Eleanor B. Niebell.

ARTHUR J. HILLAND
Arthur J. Hilland

PAUL M. NIEBELL
Paul M. Niebell
Attorneys for Plaintiffs

21 Filed Jan. 4, 1956

Statement of Points on Which Plaintiffs Intend to Rely on Appeal

On the appeal in the above-entitled action, the plaintiffs intend to rely on the following points:

1. The Court erred in excluding from the evidence the affidavits of Neil P. Campbell, M. D., and Roger S. Cohen, M. D., filed in Mental Health No. 600-54 in this Court (Plaintiffs' Exhibit 1).

2. The Court erred in excluding from the evidence the records of Saint Elizabeths Hospital (Plaintiffs' Exhibit 14).

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491 Filed Jan. 18, 1955

Last Will and Testament of Dorothy Smallwood Geare

I, DOROTHY SMALLWOOD GEARE, of the City of Washington, District of Columbia, being of sound and disposing mind and memory, do hereby make, publish and declare the following as and for my Last Will and Testament, hereby revoking all former wills and testaments, and codicils thereto, at any time heretofore made by me.

ITEM I. I authorize and direct my executrix, hereinafter named, to pay out of my estate all of the expenses of my last illness, funeral and interment, including the cost of constructing, erecting and engraving a suitable headstone or monument over my grave, in such amounts as my said executrix in her sole discretion may deem to be proper, without regard to any limitation imposed by statute, law or rule of Court, as soon after my death as may be practicable. It is my further will and direction that my remains be cremated and my ashes interred beside those of my husband and son in the Smallwood lot of Glenwood Cemetery in the District of Columbia as designated on the books of said cemetery.

ITEM II. I give and bequeath unto The Masonic and Eastern Star Home of the District of Columbia, a body corporate, the sum of One Hundred Dollars ($100.00), cash.

ITEM III. I give and devise unto Viola A. Hodson all that parcel of unimproved land owned by me and located in the District of Columbia, known as Lot 2829 in Square 851, in fee-simple.

ITEM IV. All of my clothing and wearing apparel, jewelry and articles of personal use and adornment, books, pictures, bric-a-brac, silver, silverware, china, linens, photograph albums, scrap books and household furniture, furnishings and effects of every kind and description, as well as any other tangible personal property and effects, of which
492 I may die seized and possessed, I give and bequeath unto the said Viola A. Hodson, absolutely. It is my present intention to leave a written memorandum setting forth a suggested ultimate distribution of some or all of said tangible personal property and effects in this Item bequeathed, and it is my hope and desire that such ultimate disposition of the same so suggested by me will be carried out and made. I am cognizant of the fact that this expression of a desire on my part is not legally binding and does not qualify the absolute character of the bequest made by me in this Item.

ITEM V. All of the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wheresoever situate, of which I may die seized or possessed or to which I may in any manner be entitled at the time of my death, whether now owned or hereafter acquired by me, I give, devise and bequeath, absolutely and in fee-simple, unto Margaret Hynson Studt and Viola A. Hodson, share and share alike.

ITEM VI. I do hereby nominate, constitute and appoint Viola A. Hodson as executrix of this my last will and testament, to serve without bond or undertaking. For the pur-

pose of satisfying and discharging any debts, claims and taxes of my estate, I hereby expressly authorize and empower my said executrix to sell and dispose of my estate, both real and personal, or any part thereof, without the order of any Court, without the necessity of any determination of a deficiency of personalty, and without any obligation on the part of any purchaser or purchasers to see to the application of the purchase money.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed my seal to this, my last will and testament, this 2nd day of February, 1954, at the City of Washington, D. C.

DOROTHY SMALLWOOD GEARE (SEAL)

Signed, sealed, published and declared by the above-named testatrix as and for her last will and testament
493 in the presence of us, who, at her request and in her presence, and in the presence of each other, have hereunto subscribed our names as attesting witnesses.

ROBERT L. SMELTZER
1725 Ft. Hunt Rd.
Alexandria, Virginia

R. B. SMELTZER
1801 Quincy St., N.W.
Washington, D. C.

506 Filed May 20, 1955

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Probate Court

In Re Estate of
DOROTHY SMALLWOOD GEARE, *Deceased.*

Administration No. 87018

Order Framing Issues.

Upon consideration of the caveat of Grahame Thomas Smallwood, Jr., Elizabeth S. Wier and Eleanor S. Beasley, filed against a certain paper writing bearing date the 2nd day of February, 1954, filed herein, purporting to be the last will and testament of Dorothy Smallwood Geare, deceased, and of the answer of Viola A. Hodson, filed thereto, it is by the court this 20th day of May, 1955,

ORDERED, that the following issues be and they are hereby framed to be tried before a jury on the 6th day of June 1955:

One: Was the said paper writing dated the 2nd day of February, 1954, purporting to be the last will and testament of Dorothy Smallwood Geare, deceased, executed and attested in due form, as required by law?

Two: Was the said Dorothy Smallwood Geare at the time of the making and subscribing or of the acknowledging by her of the said paper writing of sound and disposing mind and capable of executing a valid deed or contract?

Three: Was the said paper writing dated the 2nd day of February, 1954, obtained, or the execution thereof procured from the said Dorothy Smallwood Geare, deceased, by fraud or deceit practiced upon the said Dorothy Smallwood Geare by Viola A. Hodson or any other person or persons?

507 Four: Was the said paper writing dated the 2nd day of February, 1954, obtained, or the execution thereof procured from the said Dorothy Smallwood Geare, deceased, by the undue influence or duress, or coercion of Viola A. Hodson or any other person or persons?

Five: Was the said paper writing dated the 2nd day of February, 1954, revoked by Dorothy Smallwood Geare, the deceased?

Six: Was the paper writing filed in this court and bearing date the 2nd day of February, 1954, the last will and testament of Dorothy Smallwood Geare, deceased?

EDWARD M. CURRAN
Judge

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509 Filed June 27, 1955

Order Granting Motion to Consolidate for Joint Trial With Civil Action No. 1098-55

This action came on to be heard upon the motion filed herein to consolidate the issues pending before the Court in the above-entitled case for a joint trial with the issues pending before the Court in Civil Action No. 1098-55, entitled Grahame Thomas Smallwood, Jr., et al, Plaintiffs, versus Viola A. Hodson, Defendant, and thereupon, upon consideration thereof, it is, by the Court, this 27th day of June, 1955, adjudged as follows:

That the said motion be, and the same hereby is, granted and that a joint trial of the issues in the above-entitled case with the issues in Civil Action No. 1098-55, entitled Grahame Thomas Smallwood, Jr., et al, Plaintiffs, versus Viola A. Hodson, Defendant, is hereby ordered

R. B. KEECH
Judge

513 Filed Oct. 26, 1955

Order Aligning Parties

This cause having come on to be heard upon the issues framed upon the caveat and the answer thereto, it is, by the court, this 26 day of October, 1955, ordered as follows:

That the caveators shall be designated as parties plaintiff and the caveatee as party defendant.

ALEXANDER HOLTZOFF
Judge

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516 Filed Oct. 28, 1955

Third Minute Entry

Friday, October 28, 1955
Civil Division No. Four
Judge Alexander Holtzoff, Presiding

Administration No. 87,018

In Re: Estate of
DOROTHY SMALLWOOD GEARE, *Deceased.*

(CAVEATORS) *Plaintiffs,*

vs.

(CAVEATEE) *Defendant.*

Now come here again the parties aforesaid in manner aforesaid, with the same jury and alternate jurors that was respited yesterday; whereupon the trial was resumed Issue No 6 struck by the Court, and after a further hearing of the evidence, is again respited until the meeting of the Court on Monday next.

518 Filed Nov. 1, 1955

Verdicts of the Jury

Tuesday, November 1, 1955
Civil Division No. Four
Judge Alexander Holtzoff, Presiding

Administration No. 87,018

In Re: Estate of
DOROTHY SMALLWOOD GEARE, Deceased.

(CAVEATORS) *Plaintiffs*,

vs.

(CAVEATEE) *Defendant*.

Now come here, again the parties aforesaid in manner aforesaid, with the same jury and alternate juror; whereupon the trial was resumed and the alternate juror was discharged; the jury begins deliberations, verdict of the jury as to the following issue, namely: "Was the said Dorothy Smallwood Geare at the time of the making or subscribing or of the acknowledging by her of the said paper writing of sound and disposing mind and capable of executing a valid deed or contract?", is YES.; whereupon the jury is respited until the meeting of the Court tomorrow for further deliberation upon its verdict.

520 Filed Nov. 3, 1955

Thursday, November 3, 1955
Civil Division No. Four
Judge Alexander Holtzoff, Presiding

Administration No. 87,018

In Re: Estate of
DOROTHY SMALLWOOD GEARE, Deceased.

GRAHAME THOMAS SMALLWOOD, JR., ELIZABETH S. WIER, and ELEANOR BEASLEY NIEBELL, (CAVEATORS) *Plaintiffs*,

vs.

VIOLA A. HODSON, (CAVEATEE) *Defendant*.

Now come here again the parties aforesaid in manner aforesaid, with the same jury that was respited yesterday; whereupon the jury resumed its deliberation, verdict of the jury as to the following issues, namely: "Was the said paper writing dated the 2nd day of February, 1954, obtained, or the execution thereof procured from the said Dorothy Smallwood Geare, deceased, by the undue influence or duress, or coercion of Viola A. Hodson or any other person or persons?" is "NO"; "Was the said paper writing dated the 2nd day of February, 1954, revoked by Dorothy Smallwood Geare, the deceased?" is "NO"; "Was the said paper writing dated the 2nd day of February, 1954, purporting to be the last will and testament of Dorothy Smallwood Geare, deceased, executed and attested in due form, as required by law?" is "YES". By Direction of the Court; "Was the said paper writing dated the 2nd day of February, 1954, obtained, or the execution thereof procured from the said Dorothy Smallwood Geare, deceased, by fraud or deceit practiced upon the said Dorothy Smallwood Geare by Viola A. Hodson or any other person or persons?" is "NO". By Direction of the Court:

521 Filed Dec. 2, 1955

Decree Granting Probate Upon Verdict

The issues framed in this proceeding, upon the caveat and the answer thereto, having been tried in open court, and the jury having found upon their answers to the issues submitted that the paper-writing bearing date the 2nd day of February, 1954, and the duplicate original thereof bearing the same date, constitute the last will and testament of Dorothy Smallwood Geare, deceased, and upon consideration of the petition previously filed for probate and letters testamentary, it is by the Court this 2d day of December, 1955,

ADJUDGED, ORDERED and DECREED, That the said will of Dorothy Smallwood Geare, deceased, dated February 2, 1954, be and the same hereby is admitted to probate and record as a will of both real and personal property, and that letters testamentary thereunder be and they are hereby granted and shall issue to Viola A. Hodson, the executrix named in said will, provided she first files her undertaking in the penal sum of one thousand dollars ($1,000.00) with surety approved by the Court, conditioned for the faithful performance of her trust.

LUTHER W. YOUNGDAHL,
Judge

522 Filed Dec. 28, 1955

Notice of Appeal

Notice is hereby given this 28th day of December, 1955, that the caveators-plaintiffs, Grahame Thomas Smallwood, Jr., Elizabeth S. Wier and Eleanor B. Niebell, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 2nd day of December, 1955, the judgment being designated "Decree Granting Probate Upon Verdict" in favor of the caveatee-defendant, Viola A. Hodson, against said caveators-plaintiffs, Grahame Thomas Smallwood, Jr., Elizabeth S. Wier and Eleanor B. Niebell.

ARTHUR J. HILLAND
Arthur J. Hilland

PAUL M. NIEBELL
Paul M. Niebell
Attorneys for Caveators-Plaintiffs

527 Filed Jan. 4, 1956

Statement of Points on Which Plaintiffs Intend to Rely on Appeal

On the appeal in the above entitled action, the caveators-plaintiffs intend to rely on the following points:

1. The Court erred in excluding from the evidence the affidavits of Neil P. Campbell, M. D. and Roger S. Cohen, M. D., filed in Mental Health No. 600-54 in this Court (Plaintiffs' Exhibit D).

2. The Court erred in excluding from the evidence the records of Saint Elizabeths Hospital (Plaintiffs' Exhibit 14).

3. The Court erred in its instructions to the jury when the jury returned to open court after the case had been submitted to them and during their deliberations.

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2 EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Mr. Hilland: If Your Honor please, I will call the defendant, Mrs. Hodson, as an adverse witness.

The Court: Very well.

Thereupon

Viola A. Hodson

one of the defendants, called as a witness by counsel for plaintiffs and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hilland:

Q. Will you please state your full name. A. Viola A. Hodson.

The Court: Would you mind speaking loud so we can all hear you.

The Witness: Viola A. Hodson—H-o-d-s-o-n.

By Mr. Hilland:

Q. And what is your address? A. 1805 Quincy Street, Northwest.

Q. You are the defendant or caveatee in this case? A. I am.

Q. I hand you what is plaintiffs' Exhibit No. 1 for identification, and call your attention to a paper marked "Filed April 30, 1954," and to the second page, and ask you whether or not that is your signature. A. It is.

Q. And then I call your attention to the third page and ask you whether or not that is your signature. A. Yes, it is.

Q. And did you make oath to that on April 29, 1954, before Marguerite G. Wimmer, a notary public? A. I did.

Mr. Hilland: I offer that in evidence, Your Honor.

Mr. Raysor: What is it you are offering into evidence, Mr. Hilland?

Mr. Hilland: That petition, the whole petition (handing the petition to counsel).

The Court: I think you can identify the document you are offering into evidence.

Mr. Hilland: Yes. I am offering the petition which is marked "Filed April 30, 1954, Harry M. Hull, Clerk."

Mr. Raysor: I have no objection.

The Court: It may be received.

(The petition heretofore marked for identification as Plaintiffs' Exhibit No. 1 was received in evidence.)

Mr. Hilland: May I read it to the jury?

The Court: Yes.

Mr. Raysor: Does that mean the petition, or the affidavit?

The Court: Only the petition signed by the witness.

Mr. Raysor: I have no objection.

4 (Counsel for plaintiffs having read to the jury, the first part of the petition, Plaintiffs' Exhibit No. 1:)

The Court: Why don't your read just the pertinent portions of that long document?

Mr. Hilland: All right. I will read paragraph 5, then, at Your Honor's suggestion.

"Petitioner states that the mental condition of respondent has progressively worsened"

The Court: Who is the respondent? I think we should identify that.

Mr. Hilland: Dorothy Smallwood Geare.

The Court: That will be stipulated?

Mr. Raysor: Yes, Your Honor.

Mr. Hilland: And the petitioner is Mrs. Hodson.

The Court: Yes.

(Counsel for plaintiffs read to the jury paragraph 5 of the petition, Plaintiffs' Exhibit No. 1.)

Mr. Hilland: That is all Your Honor suggests that I read.

By Mr. Hilland:

Q. Mrs. Hodson, at the time you swore to that petition, on April 29, 1954, were the allegations of paragraph 5, which I have just read, true?

The Court: We are going to assume that she considered them true, because they were sworn to. You don't have to cross-examine her. Any cross examination will be for the other side.

By Mr. Hilland:

Q. Mrs. Hodson, referring to the same exhibit, that is, plaintiffs' Exhibit No. 1 for identification, I show you two other papers marked "Filed April 30, 1954," that is, this one and this one, and ask you whether or not you filed those two papers on that date, through your lawyers, in support of the petition which has just been received in evidence.

Mr. Raysor: I object, Your Honor.

The Court: This is preliminary. Please don't object unnecessarily.

The Witness: I suppose they were. They were turned over to my attorney, and that was the procedure.

By Mr. Hilland:

Q. Are you familiar with this signature on the first paper? A. Yes, I am.

Q. And whose signature is that on the first paper? A. Dr. Neil P. Campbell.

Q. And are you familiar with the signature on the second paper? A. No; I never saw it.

Q. You never saw that? A. No.

6 Q. You are not familiar with that signature? A. I never saw the man and I never saw the—

Mr. Hilland: Then, if Your Honor please, I offer this paper bearing the signature of Neil P. Campbell in evidence, as an admission against interest.

Mr. Raysor: I object to it.

The Court: Objection sustained. It is not an admission of this witness.

Mr. Hilland: May I ask her another question, Your Honor?

The Court: Yes.

By Mr. Hilland:

Q. Mrs. Hodson, you filed this paper signed by Neil P. Campbell, in support of your petition which is in evidence, did you not? A. I turned that over to my attorney. I don't know what was filed other than my own affidavit.

Q. But you obtained that paper from Dr. Campbell, did you not? A. I did not.

Q. Who obtained it? A. I think Mr. Cromelin's office did.

The Court: I am not going to admit an affidavit attached to a petition, executed by a third party, as an admission against interest by the petitioner.

7 Mr. Hilland: Yes. Well, I have made a proffer of it, Your Honor.

. . . . . .

Plaintiffs' Exhibit No. 1

Filed April 30, 1954

Petition for Writ De Lunatico Inquirendo and for Attachment

The petition of Viola A. Hodson respectfully shows to the Court as follows:

1. Your petitioner is an adult citizen of the United States and a resident of the District of Columbia, and brings this petition as provided by Sections 21-310 and 21-311 of the District of Columbia Code (1951).

2. Dorothy Smallwood Geare is a citizen of the United States and has been a resident of the District of Columbia since her birth, approximately 65 years. Her present address is 1805 Quincy Street, Northwest, Washington, D.C. At present she is a patient in Emergency Hospital, Washington, D.C., which she entered April 18, 1954, for treatment.

3. The only relatives of respondent known to your petitioner are: Grahame T. Smallwood, nephew, whose address is 3200 Sixteenth Street, Northwest, Washington, D.C.; Mrs. Elizabeth A. Weir, niece, whose address is 1900 "F" Street, Northwest, Washington, D.C.; and Mrs. Eleanor S. Beasley, niece, whose address is 3200 Sixteenth Street, Northwest, Washington, D.C.

4. Respondent does not have any property, real or personal, other than her immediate personal effects and clothing. Her only income is the sum of $57.00 monthly from the Civil Service Retirement Fund.

5. Petitioner states that the mental condition of respondent has progressively worsened since her retirement from United States Government Service in July, 1953. She is unable to care for her person. She is confused and imagines that she is in San Francisco. Petitioner believes that respondent is incapable of managing her own affairs and is not fit to be at large or to go unrestrained and, if permitted to remain at large, the rights of persons and property will be jeopardized and, further, that respondent is a fit subject for treatment because of her mental condition.

WHEREFORE, the premises considered, your petitioner respectfully prays:

1. That a Writ De Lunatico Inquirendo issue to the respondent requiring her to show cause why she should not be adjudged to be a person of unsound mind.

2. That respondent be apprehended and detained for preliminary examination in St. Elizabeths Hospital.

3. That this petition be referred to the Commission on Mental Health of the District of Columbia for report and recommendation.

4. And for such other and further relief as to the Court may seem just and proper.

VIOLA A. HODSON
Viola A. Hodson

PAUL B. CROMELIN
Paul B. Cromelin

Richard L. Walsh
RICHARD L. WALSH
Attorneys for Petitioner

District of Columbia, ss:

Viola A. Hodson, being first duly sworn, on oath deposes and says that she has read the foregoing petition by her subscribed and that the averments therein contained are true to the best of her knowledge, information and belief.

VIOLA A. HODSON
Viola A. Hodson

Subscribed and sworn to before me this 29th day of April, 1954.

MARGUERITE G. WIMMER
Notary Public, D.C.

Filed April 30, 1954

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mental Health No. 600-54

In the Matter of

DOROTHY SMALLWOOD GEARE, *Patient*

AFFIDAVIT

District of Columbia, ss:

Neil P. Campbell, being first duly sworn, on oath deposes and says that he is a citizen of the United States and a resident of the District of Columbia, residing at 1409 Newton Avenue, N.W.; that he is a physician and has Dorothy Smallwood Geare under his care and treatment at the present time; that he has observed Mrs. Geare for some months and found that her mental condition has progressively worsened; that her mental condition has deteriorated markedly since her retirement from Government employment last year; that she is disorientated and confused; that she is incontinent and has elevation of blood pressure; that she suffers from Cerebral Arteriosclerosis. It is my opinion that Dorothy Smallwood Geare is of unsound mind, incapable of managing her own affairs and not fit to be at large or to go unrestrained and, if permitted to remain at liberty, the rights of persons and property will be jeopardized; it is my opinion that Mrs. Geare is a fit subject for treatment because of her mental condition.

NEIL P. CAMPBELL
Neil P. Campbell, M. D.

Subscribed and sworn to before me this 30th day of April, 1954.

VIOLET B. BLEWETT
Notary Public, D.C.

Filed April 30, 1954

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mental Health No. 600-54

In Re: DOROTHY GEARE, *Patient*

AFFIDAVIT

I, Roger S. Cohen, M. D., being duly sworn, hereby certify that I am a citizen of The United States and that I reside at 3767 Oliver Street, N. W., Washington, D. C.; that I have practiced medicine in The District of Columbia for 30 years, that I have specialized in nervous and mental disorders and that I examined Mrs. Dorothy Geare at Emergency Hospital, Washington, D. C. on April 28, 1954 and found that she is suffering from a Psychosis with Cerebral Arteriosclerosis manifested by periods of extreme mental confusion, disorientation for time and place, marked defects of memory, especially for recent events, inappropriate laughter, difficulty in using the correct word, incontinence of urine and marked elevation of blood pressure. It is my opinion that Mrs. Dorothy Geare is of unsound mind, and it not a fit person to be at large or to go unrestrained, and if permitted to remain at liberty in The District of Columbia, the rights of persons and property will be jeopardized or the preservation of public peace imperiled and the commission of crime rendered probable and that she is a fit subject for treatment in a hospital by reason of her mental condition.

ROGER S. COHEN, M. D.
Roger S. Cohen, M. D.

Subscribed and sworn to before me, this 29th day of April, 1954.

WILLIAM S. JONES
Notary Public,
Washington, D. C.

23 By Mr. Hilland:

Q. There was no expense connected with her admission to St. Elizabeths Hospital, was there? A. Nothing but the ambulance. I have never received a bill from them.

Q. She was transferred to St. Elizabeths Hospital because of psychosis, was she not? A. I couldn't tell you. I don't know what the records say.

Q. After she was transferred to St. Elizabeths Hospital, the officials at St. Elizabeths Hospital asked you to inform them of the history in her case, did they not? A. I spoke to one person at St. Elizabeths, on the Tuesday that I went down there.

Q. And didn't that person take a long statement of information from you at that time? A. I don't think it was so long. I wasn't in his office ten minutes.

Q. But he did ask you questions? A. He did.

Q. And you answered them? A. I answered them to the best of my ability.

Mr. Hilland. I offer in evidence, Your Honor, Plaintiffs' Exhibit No. 14. You may want to see it. It is the hospital records.

24 The Court. Yes.

Have you seen it?

Mr. Hilland. Yes, he has seen it.

Mr. Raysor. Yes; I looked it over last evening.

The Court. Just hand it to the Clerk.

Mr. Hilland. What I want to ask the witness about is right there, Your Honor (indicating).

The Court. Is this in evidence?

Mr. Hilland. I am offering it now, Your Honor.

The Court. Oh, you are offering it.

Mr. Raysor. I object to it, Your Honor. He hasn't laid the proper foundation for it as yet.

The Court. I think this is an important matter. I am going to ask you gentlemen to come to the bench.

(At the bench:)

Mr. Hilland. According to the record, this is information this witness gave the hospital official.

The Court. But you are offering it in evidence.

Mr. Hilland. Yes.

The Court. Of course, there would be no question that you would have a right to cross-examine her concerning her own statements. You would have a right to ask her "Did you say so and so to the hospital officials?"

Mr. Hilland. That is what I would ask.

The Court. But you are offering the document in
25 evidence, which would permit you to read the whole document to the jury. That presents a different question.

Mr. Hilland. Yes.

The Court. What is your objection?

Mr. Raysor. I agree with Your Honor, that if he wants to interrogate her if she said so and so, and if he disagrees—

The Court. Tell me what your objection is.

Mr. Raysor. My objection is, this is offering the document itself.

The Court. Yes, I know; but what is the basis of your objection?

Mr. Raysor. It is hearsay. It isn't sworn. There are no witnesses available. It is not the best evidence.

The Court. Oh no; that is not a good ground. I presume Mr. Hilland is offering it on the basis that it is a record kept in due course of business, under the Federal Shopbook Rules.

Mr. Raysor. Yes. I have examined those authorities at length and, as I understand the rule, it is that matters of opinion, merely routine statements and dates, and things of that sort, are admissible.

Mr. Hilland. That is all I am offering.

The Court. I am going to sustain the objection.
26 You know, there are divergent rulings in different

circuits on the Federal Shopbook Rule. The Second Circuit has a much more liberal interpretation of the Federal Shopbook Rule than this circuit has. I think in the Second Circuit this would be admissible. But in the New York Life Insurance Company versus Taylor, and in a subsequent case of United States against Clainos, our Court of Appeals has limited the Federal Shopbook Rule to routine clerical entries. A statement of what somebody tells the person who keeps the record, except for purely routine facts, is not, in my judgment, within the Court of Appeals opinions.

Mr. Hilland. I thought, Your Honor, it was within the New York Life Insurance Company case.

The Court. I don't think it is now. For instance, what is within the New York Life Insurance Company versus Taylor case would be entries showing date of admission, temperature, pulse, blood pressure, or symptoms like the patient seemed dazed or incoherent; but anything beyond that would not be a routine clerical entry. If somebody accompanying the patient said the patient had been ill for so many days, I wouldn't think that would be routine.

Mr. Hilland. Isn't this admissible as an admission against interest by this witness? What I am offering here is what she told.

The Court. That is why I say you have a right to
27 ask her "Did you say so and so?" "Did you say so and so?" And if she denies she did, you have a right to show it to her and ask her if this doesn't refresh her recollection. If she say no, you have a right to subpoena the person who made this record and ask that person whether she made these statements.

But this is not a document that proves itself as a document made in due course of business, because of the Clainos interpretation of the Federal Shopbook Rule by our Court of Appeals. And you know the Supreme Court of the United States, in Palmer versus Hoffman, put a rather narrow interpretation on the Federal Shopbook Rule. That

case involved a railroad accident and the plaintiff sought to place in evidence reports of the employees of the railroad company, from the company's files. Justice Douglas, I think it was, said those were not records kept in the due course of business, because the business of the company is to run a railroad, he said, and not to litigate.

I am going to sustain the objection. But you are free to proceed along the line I have indicated.

Mr. Hilland. Yes, sir.

(Counsel having returned to trial tables:)

By Mr. Hilland:

Q. Mrs. Hodson, when you were interviewed by an official of St. Elizabeth's Hospital, after Mrs. Geare was
28 placed there on April 30, 1954, did you inform that offici that during the early months of 1954 the patient, meaning Mrs. Geare, seemed to be going more and more into a stupor? A. Not to my knowledge.

Q. Did you inform that official that during March she did not recognize her old home that she had lived in for quite a while? A. I don't remember.

Q. Do you deny that you so informed the official? A. I don't remember informing him. Most of the things he asked me, he made just check marks. He made no notation excepting on amount, I believe, as I remember.

Q. Do you deny that you told him that during the early months of 1954 Mrs. Geare seemed to be going more and more into a stupor? A. I told you I don't remember.

Q. Well, I am asking you, do you deny that you made such a statement? A. I do not remember making such statement.

Mr. Hilland. May I have an answer to the question?

The Court. If she says she does not remember, then she can neither affirm nor deny.

The Witness. He may have asked me that question.

The Court. You have answered the question. Wait until another question is asked.

By Mr. Hilland:

29 Q. Did you inform that official that during the past six weeks, March and April, that Mrs. Geare had stopped reading? A. I don't remember any of those questions ever being propounded to me.

Q. Did you inform the official that there is a possibility that she had visual hallucinations? A. No. I never even have heard the phrase.

Q. Did you tell the official that Mrs. Geare would greet people who were not there? A. No, sir.

. . . . . .

Plaintiffs' Exhibit No. 14

Standard Form 07
Promulgated August 1948
By Bureau of the Budget
Circular A-32

70,275

CLINICAL RECORD

Report on INFORMATION
or
Continuation of S. F. .....
(*Strike out one line*) (*Specify type of examination or data*)
(*Sign and date*) Dr. Steinkirchner—JMW
May 6, 1954.

Informant: Mrs. Viola D. Hodson (Friend),
1805 Quincy St., N. W.,
Washington, D. C.
TAylor 9-1805.

Note: The information appears to be valid. The informant is a well-dressed, cultural, gentle woman, who makes a real effort to impress the examiner with her contacts in the Washington social scene. The patient has been living with the informant for the last 13 years.

. . . . . .

Present Illness:

Beginning about January of 1953, the patient began to lose weight. She went from 138 lbs. in January 1953 to 96 lbs. in December of 1953. Beginning in the winter of 1953, she was very fatigued. She would spend the whole weekend in bed. In the summer of 1953 she became too exhausted to go to work. Her appetite had been poor all of 1953. She needed more sleep than usual, although during the winter of 1953 she would get up sometimes at night, being unable to sleep. In September of 1953, the patient had an episode that was possibly a nonparalytic cerebrovascular accident in which her hands suddenly went cold and limp. During the early months of 1954, the patient seemed to be going more and more into a stupor. She had several heart attacks during March and April after the stuporous condition had begun. During March she did not recognize her old home that she lived in for quite awhile. During the past six weeks (March and April), the patient had stopped reading. There is a possibility that she had visual hallucinations. She would greet people who were not there. It is also possible that when she went to Emergency Hospital on February 18, she may have had auditory hallucinations, for then the informant heard the patient say, "My stomach says, 'What do you know about that?' ". Also, the patient apparently had delusions of location, thinking that she was in San Francisco. Apparently, she went to Emergency Hospital because of a severe heart attack on April 17, going to Emergency Hospital on the 18th. At that hospital she got out of bed and began to pull the clothes of other patients. It was then that they asked that she be removed from the hospital. Hence, on the 30th, she was brought to Saint Elizabeths Hospital.

(*Continue on reverse side*)

Patient's Last Name—First Name—Middle Name
Geare Dorothy S.

Saint Elizabeths Hospital
(Name of Hospital or Other Medical Facility)

Register No. 70,275 Ward No. WR

Report On .....
or
Continuation of 507 Information -3-

19 Mr. Hilland. Miss Wolfowitz, from St. Elizabeths Hospital.

Thereupon

Ruth Wolfowitz.

called as a witness by counsel for plaintiffs and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hilland:

Q. Will you please state your full name? A. Ruth Wolfowitz—W-o-l-f-o-w-i-t-z.

Q. What is your address? A. 460 Newcomb Street, Southeast.

Q. Miss Wolfowitz, where are you employed? A. At St. Elizabeths Hospital.

Q. Have you responded to a subpoena to produce records of St. Elizabeths Hospital?

The Court. Just a moment. Is this for the introduction of records?

Mr. Hilland. That is all.

The Court. I don't think we ought to waste time on formal proof.

Mr. Hilland. All I am offering, if Your Honor please, are the factual matters—

Mr. Raysor. May this be out of the presence of the jury, Your Honor?

20 Mr. Hilland. Oh, I am not saying anything about the records. All I want to offer from those records are the factual matters which would be admissible under the decision in Taylor versus New York Life Insurance.

The Court. I suggest that the witness deliver the records to the Clerk, and she may be released, if she wishes; and at the proper time you may offer such portions in evidence as you desire. If there is any objection to any of them, I shall pass upon that at that time.

Mr. Raysor. We have no desire to keep Miss Wolfowitz.

Mr. Hilland. That will be fine. Thank you.

The Court. You may deliver the records to the Clerk.

The Witness. I have been instructed by the hospital to remain with the records, if I may.

The Court. Of course, when they are offered in evidence, they will be taken away from you. However, you may remain in the courtroom as long as you want to. The Court thought it would make it easier for you.

You may produce the records.

Mr. Hilland. I offer them in evidence, Your Honor, in accordance with our understanding, and I will take them up later.

Mr. Raysor. I object to their admission.

21 The Court. I am not going to take a blanket offer like that, if there is an objection. You will have to indicate the parts that you want to read into the record, and then Mr. Raysor will have to indicate to which of those parts he objects. Then I will have to pass upon the objection.

Mr. Hilland. Yes; that is what I have in mind, Your Honor.

. . . . . .

30 The Court (continuing). Ladies and gentlemen of the jury, the 12 regular jurors may now retire. Upon reaching the jury room you will select a foreman from amongst yourselves who will preside over your deliberations and speak for you in returning your verdict, and then proceed to reach a verdict on each of these three questions.

The 12 regular jurors will follow the Marshal. The alternate juror will please remain a moment.

(Accordingly at 2:45 p.m. the jury retired to consider of its verdict.)

The Court. At this time the Court wishes to thank the alternate juror for his participation in this trial. . . .

(At 5:30 p.m., November 1, 1955:)

The Court. Ladies and gentlemen of the jury, the hour is becoming late and some of you may be getting hungry and will be ready pretty soon for dinner. So I brought you here to make an inquiry. Who is the Foreman of the jury?

The Foreman. I am sir.

The Court. Without disclosing or indicating how the jury stands, can you state as to whether you are likely to reach a verdict very shortly, or not?

The Foreman. At the present time, Your Honor, it looks like we will not reach a verdict very shortly.

The Court. Have you reached a verdict as to any

31 one of the three questions?

The Foreman. Yes, Your Honor. We have reached a verdict on the first issue.

The Court. On the first issue?

The Foreman. Yes, sir.

The Court. But not on the other two?

The Foreman. But not on the other two.

The Court. I think, then, I will take the verdict on the first issue at this time.

The Deputy Clerk. Mr. Foreman, was the said Dorothy Smallwood Geare at the time of the making, subscribing

or of the acknowledging by her of the said paper writing of sound and disposing mind and capable of executing a valid deed or contract?

The Foreman. Yes.

The Deputy Clerk. Members of the jury, your Foreman says that your answer to Issue No. 1 is yes; and so say you each and all. (Jurors responded affirmatively.)

. . . . . .

38 (At 12:10 p.m., November 2, 1955, the jury being in the box:)

The Court. Ladies and gentlemen of the jury, the Court has received a note from your Foreman reading as follows:

"The jury has not reached agreement on Issues No. 2 and No. 3. It is requested that the Court reinstruct the jury on Issues 2 and 3."

Mr. Foreman, does the Court correctly understand that you want substantially the entire instruction on those two issues repeated?

The Foreman. Your Honor, that is correct. We feel that might clear it up.

The Court. The Court will be very glad to do that.

. . . . . .

43 Mr. Foreman, have I fully answered your questions? If you or any other member of the jury has any questions to ask, I shall be glad to endeavor to answer them.

The Foreman. You have answered the question for me, Your Honor. I couldn't speak for the rest of the members of the jury.

The Court. Does any member of the jury desire to ask anything further?

Juror No. 8. Your Honor, there is just one thing I have considered. Mrs. Hodson swore under oath, signed a paper stating that Mrs. Geare had no money to pay for hospital care. And, as I understand it, that wasn't right.

The Court. Well, no, I do not want to know what is going on in your mind, or what was discussed in the jury room.

Juror No. 8. No.

The Court. If you have any question to ask the
44 Court as to which the Court can help you, the Court will be very glad to have you ask the question. But please do not reveal the operations of your own mind in this connection.

Juror No. 8. Well, this is one thing that I don't know about. If it was proven in the evidence that she did not tell the truth in one place, do we have to consider she tells the truth in another?

The Court. That is for you to decide.

Juror No. 8. That is what I want to know.

The Court. In other words, you have a right to say "Well, she didn't tell the truth on this point, but she did tell the truth on that." Or you have a right to say "Well, she didn't tell the truth on this point, and we don't want to believe her on anything."

Some people tell the truth at all times. Some people might tell a lie on one point and tell the truth on something else. And others might tell so many lies that they are not to be believed generally. All that is for you to decide. You are to weigh the evidence and decide what evidence to believe.

I do want to say this to you: Confine your thinking and your consideration to the two questions that you have to decide, and don't go off on tangents on other matters. Just confine yourself to these questions. And in order to concentrate your mind on them, I am going to read
45 them again. Issue No. 2:

Was the paper writing—that is, the will—dated the second day of February, 1954, obtained or was the execution thereof procured, from the said Dorothy Smallwood Geare, deceased, by the undue influence or duress or coercion of Viola Hodson or any other person or persons?

You have to answer that "Yes" or "No." And concentrate on that and don't give any thought to any extraneous matters.

And then when you come to Issue No. 3, the question is:

Was the said paper writing—that is, the will—dated the second day of February, 1954, revoked by Dorothy Smallwood Geare, the deceased?

Answer that "Yes" or "No." And again concentrate on that specific question and do not consider any extraneous matters.

Have I answered your question?

Juror No. 8. I think so.

The Court: Is there any other juror that has any question? (No response.)

You may return to the jury room for further deliberation.

Mr. Niebell. Your Honor, may I make a suggestion?

The Court. No, you may not. You may come to
46 the bench if you wish to say anything. You may not say anything in open court.

(At the bench:)

Mr. Niebell. Your Honor, I was just wondering whether it would be helpful to the jury to define the term "confidential relationship."

The Court. No. There was no request for any such instruction and it is too late to submit any additional requests. I think I have told the jury enough.

(Counsel having returned to trial tables:)

The Court. You may retire and resume your deliberations.

(Accordingly at 12:25 p.m. the jury retired further to consider of its verdict.)

(At 2:55 p.m., November 2, 1955:)

The Court. Ladies and gentlemen of the jury, the Court has received a note from your Foreman reading as follows:

"We the jury have not reached an agreement on Issues No. 2 and 3. We do not appear to be close to reaching an agreement. This appears to be a hung jury. All members affirm their decisions."

Well, I am quite sure this is not a hung jury. I am not going to accept this statement, ladies and gentlemen
47 of the jury. This trial took about three or four days. It cost the taxpayers a considerable amount of money. In fact, it has taken parts of five days, and the case should be decided.

You must endeavor to reach an agreement, if at all possible. Some jury some time will have to decide this case, and you should be that jury. No jury will know any more about this case than you do. You have before you all the evidence that is available and admissible under the rules of law, and no jury will have any more than you. If I may say so, you are fully as capable and intelligent as any other jury. So you ought to make every possible effort to arrive at a verdict and to reach a conclusion on these two issues.

I am going to make certain suggestions to you which I think may be of help to you, and if you follow those suggestions I am sure you can reach a verdict in a very short time. It is of course true that the verdict of the jury should represent the opinion of each individual juror. But it by no means follows that opinions may not be changed or should not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by discussion and comparison of views and arguments among the jurors themselves.

No juror should go to the jury room with a blind determination that the verdict should represent his or her
48 opinion of the case at that moment, or that he or she should close his or her eyes and ears to the arguments of other jurors who are equally honest and equally intelligent.

Each juror should listen with deference to the arguments of the other jurors, and each juror should distrust his or her own judgment if he or she finds that a large majority of the jury takes a different view of the case than he or she takes. In that event the juror who is in a small minority or minority should search his mind very carefully and restudy the case with deference to the views of the majority of the jurors.

Of course the final verdict must be the verdict of each individual juror and not mere acquiescence in the conclusion of your fellow jurors. Nevertheless I instruct you that it is your duty to examine the issues with an open mind and with candor and with proper regard and deference to the opinions of each other. It is your duty to decide the case if you conscientiously can do so. You should listen to each other's argument with a disposition to be convinced.

If much the larger number favor one side or the other, a dissenting or minority juror should consider whether, in the light of the opinions that are expressed by the majority, he or she is not in error and should not change his views.

I want you to go back to the jury room, continue
49 your deliberations and discuss the case, among yourselves, in the light of these additional instructions that I have given you, and in a friendly spirit; and I see no reason why you should not promptly reach a verdict.

You may return to the jury room.

(Accordingly at 3:00 p.m. the jury again retired to consider further of its verdict.)

(At 3:45 p.m., November 2, 1955:)

The Court. Mr. Foreman, without disclosing how the jury stands, will you please inform the Court what progress you are making towards arriving at a verdict. Are you likely to have a verdict very shortly?

The Foreman. It doesn't appear, Your Honor, that we will have a verdict very shortly. We are still discussing it and arguing it and trying to reach a verdict.

The Court: I beg pardon?

The Foreman. We are still arguing it and discussing it and trying to reach a verdict; but we are not unanimously agreed.

The Court. Have you agreed on either of the two questions remaining?

The Foreman. No, sir; not on issues 2 and 3.

The Court. Of course, you have been locked up in the jury room since ten o'clock this morning, and I am wondering whether it would not be better to let you go for the day so that you can get out and get some fresh air and get the cobwebs out of your minds, so to speak, and come back tomorrow and resume your deliberations, or whether you would rather continue them further this afternoon. Will those of you who would rather be released at this time and come back tomorrow morning raise your hands. (Most of the jurors so responded.)

And how many would rather continue this afternoon? (Two of the jurors so responded.)

There are only two who would rather continue this afternoon. I think I ought to be guided by the comfort and desires of the majority. I think, too, that perhaps it might be conducive to reaching a verdict if you are given a chance to get away from each other after having been together since ten o'clock. Perhaps the tempers of some of you might be frayed. I hope not. But it is a nervous strain. So I am going to release you now, to come back tomorrow morning to the jury room at ten o'clock and to continue your deliberations.

I want you all, each one of you, to bear in mind the suggestions that I made to you at three o'clock, when you were back here, namely, that we have spent five days trying this case. That is an expense to the taxpayers. You should reach a decision. Some jury will have to de-

cide this case and you should be that jury, because
51 no other jury will know any more about the case than you do. And I want to repeat, again, that if a large majority is one way or the other—and I don't care which way—then the minority should be humble enough to ask themselves whether they ought not reconsider their views.

The purpose of the jury system is for the jurors to confer with each other, and not for each one to cast his own individual vote and adhere to it throughout. Of course the final judgment must be the judgment of each individual juror; but in arriving at that judgment each juror should carefully consider the views of the other jurors, with respect and patience and deference. And particularly if a large majority is one way or the other, the dissenting or the minority jurors ought to ask themselves whether they should not review again the arguments of the majority and possibly adhere to their views.

I am not asking you to give up your convictions; but I am suggesting that each one of you owes it to the other jurors to give careful weight to their views in deciding what your own vote should be, especially if a large majority is one way or the other. Of course, I do not know whether that is the case or not.

And the minute you leave the jury box, do not discuss this case until you have come back to the jury room at ten o'clock tomorrow morning. You will be excused at
52 this time. Please be back in the jury room at ten o'clock tomorrow morning.

(Accordingly at 3:50 p.m. the jury was excused, to return and resume their deliberations at 10 o'clock tomorrow morning, Thursday, November 3, 1955.)

Thursday, November 3, 1955

Before Judge ALEXANDER HOLTZOFF and a jury, the jury having been excused at 3:50 p.m. yesterday to return and resume its deliberations at 10 a.m. today.

54 (The jury returned to the Court Room at 2:45 p.m., after which the following occurred in open court:)

The Court: Ladies and gentlemen of the jury, the Court has received the following note from your foreman:

"We, the jurors, request that we be reinstructed regarding our responsibilities to get together on a unanimous verdict."

Your responsibility is this, and I am going to repeat briefly the remarks that I made about twenty-four hours ago.

The object of the jury system is to secure unanimity by comparison of views in the jury room and by discussions among the jurors themselves.

In other words, each juror should listen with deference to the arguments of the other jurors.

And each juror should have a distrust of his own judgment if he or she should find that a large majority of the jury takes a different view.

In other words, no juror should go to the jury room and stay there in the jury room with a blind determination that the verdict should represent his or her opinion on the case at that particular moment.

No juror should close his or her eyes and ears to the arguments of other jurors who are equally honest and equally intelligent.

55 Of course, the verdict finally must be the verdict of each individual juror, and not a mere acquiescence in the conclusions of the other jurors, but each juror should examine the subject with an open mind and with

candor and with proper deference to the opinions of each other juror.

It is your duty to decide the case if you can conscientiously do so.

You should listen to each other's argument with a disposition to be convinced. If the majority of the jurors favor one side or another, a minority or dissenting juror should consider whether in the light of the opinions that are expressed by the other jurors in the jury room, he or she may be in error.

And now, these issues are not difficult. They are simple. They have been tried out very ably by both sides.

All available evidence that is admissible under the rules of law have been brought before you. And a decision has to be reached by a jury, and you are that jury.

No other jury will know anything more about the case than you do, and you ought to make every effort, and you have a responsibility to endeavor to arrive at a unanimous verdict and reach a conclusion.

Now, I want you to go back to the jury room, and make an effort—a real effort—to arrive at a unanimous verdict, and again I repeat, that each juror should not as-
56 sume that his views are the only right views. You must listen and consider with deference the views of the other jurors, especially if there is a large majority preponderating one way or the other, and in that event the minority or the dissenting jurors should have some distrust of their own judgment, and re-examine the issues with a deference to the opinions of the other jurors.

Now, is there anything else that any member of the jury would like to ask the court?

The Foreman: Your Honor—

The Court: Mr. Foreman?

The Foreman: I don't have a question of my own, but I think one member of our panel would like to ask a question.

(One of the lady jurors indicated that she did not wish to ask a question.)

The Foreman: I am sorry, sir. I was mistaken.

The Court: I hope you will reach a verdict. This case took about five days to try. You have all the evidence. You have been out for a long time. I think you ought to reach a verdict promptly. I hope you will do so.

(At the bench:)

Mr. Hilland: Your Honor, yesterday when you gave them the same charge, you told them that they did not have to give up their own convictions. I don't believe I heard you say that today.

57 The Court: I am not going to say it. I did say that the verdict of the jury—the final verdict—must represent the verdict of each individual juror.

Mr. Hilland: Should they be told that they didn't have to give up their own convictions for—

The Court: I did not tell them that yesterday.

Mr. Hilland: I am quite sure that I heard your Honor say that.

The Court: I do not use those words. I am not going to tell them that.

Mr. Hilland: May the record show that I requested the court to tell them that no individual juror need give up their own convictions?

The Court: I deny the request.

Mr. Hilland: I am wondering about leaving them out for long. You know it is actually two days as of now since they were let out, or they took the case. It does seem to me, I don't know how they stand. I have no idea.

The Court: I have known of jurors staying out a week or more.

Mr. Hilland: I have never—

The Court: That does not often happen in civil cases. I remember a case in the southern district of California a couple of years ago where the jury was out eight or ten

days. I do not say that I am going to keep them that long.
I think they will get a verdict very promptly. I
58 do not know which way they are heading, but I
have a feeling that there must be one, two or three jurors that are standing out against the balance. I do not know which way it is.

(End of bench conference.)

The Court: You may retire to the jury room and I hope you will have a verdict very promptly.

(The jury retired to the jury room at 2:55 PM.)

(The jury returned to the court room at 2:58 PM and the following occurred in open court:)

The Court: You may proceed.

The Deputy Clerk: Mr. Foreman, has the jury reached a verdict?

The Foreman: We have.

The Deputy Clerk: On issue No. 2, namely, was the said paper writing dated the second day of February, 1954, obtained, or the execution thereof procured from the said Dorothy Smallwood Geare, deceased, by the undue influence or duress or coercion of Viola A. Hodson or any other person or persons?

The Foreman: The answer is no.

The Deputy Clerk: As to issue No. 3, namely, was the said paper writing dated the second day of February, 1954, revoked, by Dorothy Smallwood Geare, the deceased?

The Foreman: No.

The Deputy Clerk: Members of the jury your
59 foreman says that your answers to issues two and
three are "no" and that is your verdict, so say you each and all?

(The jury indicated that was their verdict.)

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consolidated Cases Nos. 13,201 and 13,202

GRAHAME THOMAS SMALLWOOD, JR., ET AL., *Appellants*

v.

VIOLA A. HODSON, ET AL., *Appellees*

Appeal From the United States District Court for the District of Columbia

---

APPELLANTS' SUPPLEMENTAL APPENDIX

[The transcript following appears at pages 345 to 350 of the supplemental record, filed October 29, 1956.]

Proceedings—Monday, October 31, 1955

The Deputy Clerk. Smallwood et al. versus Hodson et al.

The Court. You may bring in the jury.

(The jury now being in the box:)

The Court. Gentlemen, have you prepared any objections you may have to any of the hospital records? You may come to the bench and I will pass on the objections at the bench.

(Emergency Hospital records are identified as Plaintiffs' Exhibit No. 18.)

(At the bench:)

The Court. Very well. Do you have the exhibits? (The exhibits, hospital records, were handed to the Court.)

You are offering in evidence the marked portions of the records of the Emergency Hospital and the St. Elizabeths Hospital, Mr. Hilland?

Mr. Hilland. Yes, Your Honor.

The Court. To which of these extracts do you object? I need not look at the others, of course.

Mr. Raysor. Your Honor, I have gone over this file with Mr. Hilland and I believe there are two that we object to in the Emergency Hospital. Those are two sheets, of April 18 and October 5.

The Court. You don't object to any others?

Mr. Raysor. No; that is right.

The Court. Do you object to any of the others?

Mr. Raysor. I don't think we objected to anything in here, either. If we did, it was with a white slip, if I may just check it.

May it please the Court, on the first jacket of St. Elizabeths, we have no objection. On this last record, I believe Your Honor has already ruled that one out.

Mr. Hilland. Your Honor has already ruled that out.

The Court. Yes, I have already ruled on that.

Mr. Raysor. Then that will not be read.

Then this is a doctor's statement; so that I believe Your Honor has ruled that is not a routine record, under the New York Life case.

The Court. Just what part? Do you object to the whole page?

Mr. Raysor. Just this part.

The Court. Because the second half of the page is obviously a routine entry.

Mr. Raysor. Yes; I have no objection to that, Your Honor.

The Court. That is a record of what she told to whomever made this record.

Mr. Hilland. It is a history of the case, as I recall.

The Court. Yes, that is what that is. I am going to sustain the objection to that. Of course, the history given to a physician is admissible, if the physician is testifying to what the patient told him. But a written narrative of it is hearsay, because it is not within the Federal Shopbook Rule. It is not a record kept in the due course of business, as interpreted in the Taylor case or the Clainos case. I will sustain the objection.

Mr. Hilland. I thought it would be, in view of the fact that it is normal practice to take the history of patients, as merely factual statements. It does tend to show her state of mind.

The Court. Yes, of course. I think it is relevant. In other words, if the doctor were here, that would be entirely admissible. But I think it is not a routine entry. It is a paraphrasing made by the person making the record, of what the patient told him or her. I think in some jurisdictions this would be admissible. But under the narrow construction placed upon the Federal Shopbook Rule by the Taylor case and the Clainos case, I am constrained to hold that this is not admissible. I think if I were sitting in the Second Circuit I would hold the other way, because of Court of Appeals decisions there. And I must say the Supreme Court decision in Palmer against Hoffman tends to sustain the view of our Court of Appeals, because there a narrative of an accident made by a railroad employee to his superior was held inadmissible as not being a record kept in the due course of business.

Mr. Hilland. In order to get this identified, may I say it is on the—

The Court. If you wish, you may have it transcribed into the record, so as to preserve your rights.

Mr. Hilland. All right. It is part of the St. Elizabeths Hospital record. The form is "Clinical Record." The

date is April 30, 1954. I can't quite read the first sentence; but it appears to be "Patient is direct admission to hospital. She states she was taken from her home, where she lived alone, and brought here. Does not know why. She doesn't realize she is sick. She states she has been working in a store. She knew her husband died 30 years ago. She has no children, but some nieces and nephews. She is quite cooperative, pleasant, answers questions readily. At times she is incoherent. Shows gross memory defects, and is disoriented."

The Court. Your objection to the Court's ruling is noted.

Mr. Hilland. Yes, Your Honor.

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FILED
AUG 12 1957
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No. 362

BRIEF FOR APPELLEES AND APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appeal from the United States District Court for the District of Columbia

United States Court of Appeals
For the
District of Columbia Circuit

FILED

SEP 25 1956

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QUESTIONS PRESENTED

1. Appellants as part of their case in chief called Appellee Hodson as an adverse witness and cross examined her as to statements sworn to by her in a Petition De Lunatico Inquirendo filed April 30, 1954. The judge permitted such cross-examination. Appellants then sought to offer into evidence the petition accompanied by affidavits of two physicians to the effect that Dorothy Smallwood Geare was of unsound mind as of April 29 and 30, 1954. The physicians were available to testify in person. The questions of mental capacity related to February 2, 1954. There was never any adjudication of insanity as Geare was discharged one week after Petition was filed. The question is: whether it was error to exclude the affidavits.

2. Portions of records of Emergency Hospital for the period of April 18, through April 30, 1954, were admitted into evidence. Two physicians from St. Elizabeth's Hospital testified. Appellee Hodson was cross-examined at length as an adverse witness in the light of the foregoing evidence. She was also cross-examined relative to statements made by her to an official at St. Elizabeth's Hospital relative to the patient's history. Appellants did not produce the official but sought to contradict her by introducing an unsigned statement from the St. Elizabeth's Hospital files, containing other than routine entries. The question is: Was this statement properly excluded?

3. The Trial Court gave a full and complete charge to the jury and subsequently answered questions from the jury. Was it error to state to the jury that each juror, without giving up his convictions should give careful weight to the views of the majority, after a trial lasting five Court days, in an effort to reach a unanimous verdict?

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Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEES AND APPENDIX

COUNTERSTATEMENT OF CASES

A. Case No. 13,201

Case No. 13,201 arises out of an action by Appellants Grahame Thomas Smallwood, Jr., Elizabeth S. Wier, and Eleanor S. Beasley, plaintiffs below, against Appellees Viola A. Hodson and Margaret Hynson Studt, defendants below, to set aside a deed dated February 2, 1954 convey-

ing an equity in lot 83 in square 2061 known as 3047 Porter Street, N. W., in the District of Columbia from Dorothy Smallwood Geare, grantor, to Viola A. Hodson and for an accounting. Pursuant to an agreement made with Dorothy Smallwood Geare, Viola A. Hodson on April 13, 1954, conveyed an undivided one-half interest in the real estate to Margaret Hynson Studt. Geare died on December 28, 1954. Appellants contended: (1) that Dorothy Smallwood Geare lacked mental capacity to make the deed on February 2, 1954, and (2) that the deed was obtained by fraud, deceit, undue influence, duress or coercion. These contentions were denied by appellees and trial before a judge ensued on these issues.

This case was ordered by the District Court to be tried simultaneously with Case No. 13,202 which was a will contest involving the will of Dorothy Smallwood Geare dated February 2, 1954. The two cases were so tried, Case No. 13,201 being tried to a judge and Case No. 13,202 being tried to a jury. The trials required parts of seven days, and the evidence included five witnesses and eighteen exhibits for appellants and twelve witnesses and nine exhibits for appellees. *None of the appellants took the stand and testified although they were present in the courtroom.* Their case principally consisted of calling and cross-examining appellee Hodson as an adverse witness, testimony of a physician (Dr. Anna Coyne Todd), and introducing hospital records of Emergency Hospital for the period April 18, 1954, to April 30, 1954, and St. Elizabeths Hospital records for the period April 30, 1954 to May 6, 1954. Dr. Irma Belk Hobart of St. Elizabeths Hospital was also called as a witness by appellants but had insufficient recollection of the case to testify. Appellants produced no direct testimony supporting their contentions concerning the deed or the will executed on February 2, 1954, or shortly prior thereto or immediately thereafter.

Appellees on the other hand produced witnesses Edna P. Hetzel and Katie May Ayre who testified as to the due

execution of the deed and that Dorothy Smallwood Geare was of sound mind at that time and not under any constraint. The disinterested notary public Glenn C. Russell also testified to the same effect. Witnesses to the will Robert B. Smeltzer, a responsible businessman, and his son, Robert Lionel Smeltzer, a lawyer admitted to practice in the District of Columbia and a businessman, testified that on the same day about three hours after the deed had been executed on February 2, 1954, Dorothy Smallwood Geare was of sound mind and capable of executing a valid deed or contract. The maid, Elizabeth Hagler, testified to the effect that all day on February 2, 1956 Dorothy Smallwood Geare was competent and not under any undue influence. Withstanding a searching cross-examination, Viola A. Hodson testified to the same effect. All of these witnesses as well as others indicated there was no undue influence, coercion, fraud or duress and that Geare was fully competent during this period.

Appellant Hodson testified that she was a close and intimate friend of Dorothy Smallwood Geare and had known her since 1910; that from time to time she loaned her money; that in March of 1942 Geare was an alcoholic who had been put out of her room and Hodson took her into her own home in Crestwood until she could find a place to live but she never left and asked Hodson to let her stay there; that Geare only contributed to her support sporadically; that she paid nothing in the last year of life (1954); that Hodson befriended her in many ways including driving her back and forth to work; that she obtained a job for Geare as an auditor in the Navy Department; that Hodson treated Geare like a sister; that in 1953 Geare's health started to deteriorate and she lost weight after she had her teeth extracted and had a varicose vein operation; that she seemed to tire more easily; that in July 1953 she went on sick leave from her employment but returned and worked December 21, 22, 23, 24, 1954; that she voluntarily retired after the end of December 1954; that Geare con-

tinued to look after her own affairs and contracted with a Mr. Ward in September 1953 to repair her house at 3047 Porter Street, N.W.; that she attended a Christmas party at the home of Mrs. Marguerite Hynson going and coming by herself; that her mental condition was sound at all times until Geare had a heart attack on March 22, 1954; that after that she became confused; that on April 18, 1954, she was taken to Emergency Hospital where she was more disoriented and confused; that she thought she was in San Francisco; that she got out of bed and walked around; that she was under sedation; that the officials at Emergency Hospital said they didn't have the facilities to look after Geare; that Hodson then made arrangements to transfer Geare to St. Elizabeths where she was transferred on April 30, 1954; that she was only there a week when she seemed better and asked Hodson to take her back into her home; that there was no adjudication and formal commitment; that the hospital officials at St. Elizabeths authorized Geare's return to Hodson's home on May 6, 1954; that Geare improved physically and mentally after that; that Geare was able to go out for hairdressing on August 18, 1954, and September, 1954; that on October 5, 1954, Hodson had to leave for Boston and she had no one to leave with Geare so she put her in Emergency Hospital at her physician's suggestion; that on Hodson's return Geare was worse; that on December 28, 1954, she died.

Witnesses Hynson, Studt, Hetzel, Hagler and Hodson testified in substance that around December, 1953, and January and February, 1954, Geare discussed disposition of her property; that she wanted the residue of her estate to be divided equally between Hodson and Margaret Hynson Studt, her godchild, who was the daughter of her college schoolmate, Mrs. Marguerite Hynson; that she wanted to deed the real estate to Hodson in order to increase the existing encumbrance so as to pay for repairs to continue to have the property rentable; that thereafter she wanted to deed the property to Hodson and Studt equally with the

understanding that the income from the property would be paid to Geare for life. With this agreement Geare conveyed property to Hodson on February 2, 1954, and after increasing the trust on April 13, 1954, Hodson conveyed an undivided one half interest to Studt. (Appellees' App. 2, 3)

The considerable body of direct evidence for appellees amply supports the findings of the court on November 3, 1955, which read as follows:

. . . . . .

The Court: The issues relating to the validity of the will have been passed upon by the jury.

Consolidated with the will contest, was the action to set aside the deed, and that action has to be determined by the Court without a jury.

The Court stated, however, at the opening of the consolidated trial, that it would treat the verdict of the jury as advisory on those issues which were common to both cases. And treating the verdict as advisory, the Court is going to accept it and follow it.

The Court might add that even if there were no advisory jury, the Court would independently reach the same conclusion.

The Court finds that as of the date of the execution of the deed, the deceased had mental capacity to execute it;

That the execution of the deed was not procured by any undue influence or fraud;

And that the deed was intended to be a conveyance of the property in fee simple absolute, subject to a conveyance of a half interest to Mrs. Studt to whom Mrs. Hodson actually conveyed that half interest.

The Court in conclusion may make the following comments.

The evidence on the issue of mental capacity was overwhelming that on February 2, and generally around that date, the decedent was in full possession of her mental faculties, and that she was fully aware of what she intended to do, and did exactly what she intended.

In fact, she would have been an ingrate if she had not given substantial recognition to Mrs. Hodson,

who befriended her; who gave her a home in her declining years; and who was not being sufficiently or fully compensated for the room and board, and the care and the services, that she rendered.

The Court was impressed by the fact that although the psychiatrist found the testatrix of unsound mind sometime after she had a heart attack, and the psychiatrist testified that the condition must have existed for sometime prior to the examination, there was not a single witness who saw the decedent on or about February 2—some of whom were interested witnesses, but some of whom were disinterested—I repeat, there was not a single witness who saw the decedent around that time who testified that she was otherwise than normal from a mental standpoint.

The Court was impressed also by the circumstance that the caveators, the nephew and nieces, did not testify on this issue, or on any other issue. They did not testify because they did not know. They were not there. They never called to see their elderly aunt, although they were all living within easy distance. Their aunt was being befriended by a stranger, and yet this nephew and these nieces never having seen their aunt about this time, caused a document to be filed in this Court, alleging, in effect, that she was insane at that time. It seems to the Court that they were playing an ignoble part. I think it was due to thoughtlessness, rather than to evil intent, because they are estimable and respectable people. But greed and cupidity sometimes makes even respectable people stoop to ignoble things.

They also caused a document to be filed attacking Mrs. Hodson as having exercised fraud and undue influence. The Court was impressed with the sincerity and the probity of Mrs. Hodson. She withstood a very able and skillful cross-examination, conducted in the best traditions of the Bar. She gave a very convincing explanation of how the deed and the will came to be drawn and executed. That she acted in good faith is evidenced in part by the fact that she testified that Mrs. Geare, the deceased, instructed her to convey a half interest in the property to Mrs. Studt, the godchild of the deceased, but in the meantime, she was to take the record title in her own name in order that it

would be easier to obtain a loan on the property while Mrs. Studt might be in Panama.

This intent was carried out by Mrs. Hodson, although there was not a scrap in writing proving that Mrs. Geare gave any instructions to Mrs. Hodson to convey a half interest in the property to Mrs. Studt.

This is one of those cases that, unfortunately, happen all too often, where an elderly relative is cared for by a Good Samaritan, but is neglected by members of her own family, who stay away while the elderly relative is living, but spring forward to claim a share in the property after her decease.

I think the verdict of the jury is not only warranted and sustained by the evidence—no other conclusion was reasonable—but it also does equity, and is in accordance with good morals and good conscience.

The Court will render judgment for the defendant on the merits in the action relating to the deed, with costs to be assessed against the plaintiffs.

B. Case No. 13,202

Case No. 13,202 is the will contest over the last will and testament of Dorothy Smallwood Geare dated February 2, 1954. The Appellants, plaintiffs below, contested the will on three grounds namely: (1) mental capacity, (2) undue influence, (3) revocation. At the conclusion of deliberations of jury on the afternoon of November 1, 1955, the jury reached agreement that Geare had mental capacity. The jury was polled and each responded in the affirmative.

Shortly after noon on November 2, 1955, the jury requested additional instructions on issues 2 and 3 and the Court reinstructed them and answered questions. On the next day in the early afternoon the jury returned its verdict on issues 2 and 3 that there was no undue influence and no revocation. The jury was polled and each individual juror stated no to each question.

Insofar as material, the testimony described under A hereof is incorporated by reference.

Disinterested witnesses Robert B. Smeltzer and Robert Lionel Smeltzer proved due execution of the will. Witnesses Edna P. Hetzel, Katie May Ayre, Glenn C. Russell, Elizabeth Hagler and Viola A. Hodson proved the rational conduct of Geare throughout the day of February 2, 1954. Geare had luncheon downstairs when she was fully dressed; executed the deed around 5 to 5:30 P.M.; had dinner downstairs; watched newscast over television around seven o'clock; retired to her bedroom; executed will around 8 P.M. During day she even transacted some business. (Tr. 410)

Witnesses Studt, Hynson, Hetzel and Hodson testified of desire of Geare during end of December, 1953, and January and February, 1954, to dispose of her property by will giving the residue to Hodson and Studt equally. Maid Hagler testified as to scraps of notes made by Geare around this time which she found on floor. (Tr. 475) Witness Hodson referred to handwritten notes made by Geare in January, 1954. (Appellees' App. 5, 6, 7) Witness Hodson produced original letter dated February 17, 1954, (Appellees' App. 9) from Geare which reads in part:

> "I am writing this memo in order to facilitate your work in disposing of my tangible personal property mentioned in item 'IV' of my Will dated February 2, 1954.
>
> First I wish to express to you, my devotion and gratitude for your love and care, and above all for your unfailing faith in me. Many times when all the world seemed black you have boosted my spirits and given me a new outlook on life. I shall be ever grateful for all your goodness to me.
>
> The years since I came to you, in March, 1942, have been happy ones. As I have told you I have lived in your house longer than any place since I was born July 5, 1889. I wish to thank Frank for all of his understanding care that has really made me feel secure in your home. Katie and Edna too, share in my grate-

ful thanks. They have been wonderful understanding friends, and I love them dearly.

* * * * * * *

"To the children of my brother, namely Grahame T. Smallwood, Jr., Elizabeth Anne Wier and Eleanor Warrene Beasley, such photographs or family mementos they might desire, should they evidence any interest, but doubt that they will do."

* * * * * * *

To show cordial relationship between themselves and Geare, Appellants introduced and read to jury the following: (1) Plaintiff's Exhibit 16 which was a letter dated November, 1948, giving permission to Grahame Smallwood to copy certain lineage papers and giving certain family background which was signed "Affectionately, Aunt Dorothy" and (2) a Christmas card with a note from Aunt Dorothy expressing "Love and best wishes for 1953." (Tr. 190 *et seq.*)

Witness Phyllis M. Carpenter was Geare's supervisor at the Navy Regional Accounts Office of the Navy Department. She testified Geare was absolutely of sound mind in December, 1953 (Tr. 399); that Geare was an invoice auditor and very competent; that she saw Geare around latter part of February or early March, 1954, at Hodson's home; that Geare "definitely was of sound mind" (Tr. 400). Hodson used to bring her to work and occasionally she rode the bus (Tr. 406).

Witness Edna P. Hetzel testified that Geare's mental condition was good even to early March, 1954, but she was in rundown physical condition and had lost weight (Tr. 409). Geare was well taken care of by Hodson; anything Geare desired she had; and all the care she needed through the years (Tr. 420 *et seq.*). Hodson took her riding and fixed anything she wanted to eat. "It was a very loving kindness there." (Tr. 421) Witness Ayre stated Hodson

treated Geare same as she did Ayre and Ayre was Hodson's sister (Tr. 450).

Witness Grissinger testified Geare was in her hairdresser shop as late as September, 1954, and on August 18, 1954 (Tr. 463), but never saw anything wrong with her mind (Tr. 465). "She had a brilliant mind" (Tr. 465).

Witness Hagler said as to clippings that Geare stated she was changing her will; that Geare said "'Well, I am changing it because my relatives I haven't seen for some time.' And she says, 'No one loves me.' And she said, 'But for Mrs. Hodson, I would be sleeping in the park.'" (Tr. 475).

Witness Sisk a real estate broker saw Geare once a week in January and February, 1954 and he was of good mental condition. Witness Greenstreet testified to the same general effect.

Witness Hynson testified she and Geare were College classmates in 1908 and had been friends thereafter; (Tr. 497); that they had Christmas dinner in 1953; that in January, 1954, Geare spoke to her about changing her will and she and her daughter Studt visited Geare; that Geare was then working on her income tax return (Tr. 498); that Geare said she wanted to include Studt in her will (Tr. 499); that her mental condition in December, 1953, and January, 1954, was as clear as it ever was.

Witness Studt corroborated her mother's testimony (Tr. 510) including Geare's statement that she intended to make her a beneficiary under her will (Tr. 513).

The only testimony as to revocation was that Geare accidentally tore the carbon copy of the will (Defendant's Exhibit No. 2) thinking she was tearing up the carbon of a 1948 will. Hodson testified consistently "And when she tore it, she (Geare) asked me if I would mend it. And she held it, and I put the Scotch tape on it for her" (Tr. 188).

The Record

Appellants were ordered by the District Court (Appellees' App. 1), following motion and argument, to file additional parts of the transcript containing the complete charge of the Judge to the Jury and colloquy of counsel and the Court relating thereto, but failed to comply, necessitating the Appellees to do this. Added parts of charge are printed in Appellees' App. 11, 12, and other added parts are in Transcript.

STATUTES AND RULES INVOLVED

Title 14, Section 308, D. C. Code, 1951 Ed.:

> "In the courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or his legal representative, to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity, whether such information shall have been obtained from the patient or from his family or from the person or persons in charge of him. * * *"

District of Columbia Code, 1951 Ed., Section 21-311:

> "Upon the filing with the court of a verified petition as hereinabove provided, accompanied by the affidavits of two or more responsible residents of the District of Columbia setting forth that they believe the person therein named to be insane or of unsound mind, the length of time they have known such person, that they believe such person to be incapable of managing his own affairs, * * * the court, or any judge thereof in vacation, may, in its or his discretion, issue an attachment for the immediate apprehension and detention, *for preliminary examination*, of such person in Saint Elizabeths Hospital and, unless found by the staff of Saint Elizabeths Hospital to be of sound mind, therein for a period not exceeding thirty days." (Italics supplied)

Federal Rules of Civil Procedure, Rule 75(b):

> "* * * If the designation includes only part of the Reporter's transcript, the applicant shall file a copy of

such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed."

SUMMARY OF ARGUMENT

1. Extensive cross-examination of Appellee Hodson by able counsel using the Petition De Lunatico Inquirendo was permitted by the trial judge and this was proper on the basis of possible admission against interest or to attack credibility. The Petition itself signed and sworn to by Appellee Hodson was admitted into evidence.

To permit the introduction of the physician's affidavits would have been prejudicial. First they were not admissions. Second they might be considered by the jury to be statements of physicians as to mental capacity at an earlier date without the opportunity of cross-examination. Third, the physicians themselves were available if such testimony was admissible under Title 14, Section 308, D. C. Code, 1951 Ed., *supra*. Fourth, if their testimony was not properly admissible under Title 14, Section 308, D. C. Code, *supra*, the affidavits would not be admissible. Fifth, they were not relevant; since the significant date for the deed and will was February 2, 1954. Sixth, there was no formal hearing before the Mental Health Commission (only a preliminary hearing) and there never was a final order of adjudication. A person is presumed sane until adjudicated insane.

2. Plaintiffs' Exhibit No. 14 (Appellant's App. 32), is an unsigned Report on Information which was extensively used by Appellants for cross-examination purposes (Appellant's App. 28, et seq.). There was no proof that this was the person Appellee Hodson spoke to. The best evidence to impeach would have been the official the witness was in contact with at the hospital. This was not a hospital record of routine entries on a patient such as pulse,

blood pressure, etc., which are admissible. Furthermore, the witness testified "most of the things he asked me, he made just check marks. He made no notation excepting on amount, I believe, as I remember" (Appellant's App. 31). The accuracy of the unsigned, unsworn document was questioned by the witness under oath. The witness also under oath denied: (1) telling the official that Geare had "visual hallucinations"; (2) that Geare would greet people who were not there (Appellant's App. 32). It contains opinion material.

3. The instructions of the Court to the jury were not prejudicial. The trial lasted five trial days. There was much evidence. The cost to the taxpayers as well as to the litigants was a consideration to be taken into account in making every reasonable and fair effort to have the jury reach a verdict.

ARGUMENT

Point No. 1. The District Court Properly Excluded From the Evidence the Affidavits of Drs. Campbell and Cohen. To Have Admitted Such Affidavits Would Have Been Highly Prejudicial

The will of Dorothy Smallwood Geare was executed by her on February 2, 1954. The conveyance of the real estate was also executed and acknowledged by her on February 2, 1954.

On the 18th day of April, 1954, Dorothy Smallwood Geare was ill in Emergency Hospital. Her condition worsened; she was disoriented and confused; she would get out of bed; and on April 30, 1954, Appellee Hodson, as next friend, executed a Petition *De Lunatico Inquirendo* with respect to Geare. This petition is known as Mental Health No. 600-54. Geare was transferred from Emergency Hospital to St. Elizabeths Hospital on April 30, 1954, and the case was set down for a hearing to be held on May 11, 1954, before the Mental Health Commission. Following her admission to

St. Elizabeths Geare improved, according to Hodson's testimony. Prior to the date set for hearing before the Mental Health Commission, Hodson, at Geare's request, asked the discharge of Geare, and she was discharged on May 6, 1954, to her custody and the case was closed. There was no formal hearing before the Mental Health Commission and, of course, *there was no final order of adjudication.* A person is presumed to be sane until adjudicated to be insane. *Rudolph* v. *United States*, 36 App. D.C. 379, 385; 31 C.J.S. Evidence, Sec. 147, p. 826; 68 C. J. Wills, Sec. 43, p. 444.

The issue involved in the instant case is the mental capacity of Dorothy Smallwood Geare on February 2, 1954, not the issue of whether or not she was in need of care and treatment on the subsequent remote dates of April 30-May 6, 1954. It would be prejudicial to interject such proceedings into this case when Mrs. Geare was not adjudicated to be of unsound mind in such mental health proceedings.

In *Labofish* v. *Berman*, 60 App. D.C. 397, 55 Fed. 2d 1022, the Court of Appeals said:

> "The last exception relates to the refusal of the court to allow the physician who attended testator immediately prior to and at the time of his death to express an opinion as to his mental condition at that time. It is perhaps sufficient to say, as to this, that the issue was not the ability of the testator at the time immediately before his death to make a will, but *as of the time it was made* • • • ". (p. 400)

The Court of Appeals also said in *Thompson* v. *Smith*, 70 App. D.C. 65, 103 Fed. 2d 936;

> "The crucial question in the case was whether or not the decedent was of sound and disposing mind *at the moment of execution of the will.*" (p. 69)

There are many authorities to the same effect. 68 C. J. Wills, Sec. 9, page 416. The issue on which direct proof must be adduced, as distinguished from indirect or sub-

sidiary proof, is the mental capacity of Dorothy Smallwood Geare on February 2, 1954, *at the moment that the will was executed.*

Proceedings under the Mental Health Act are not final and do not adjudicate anything as to mental competency until the Court makes an order finally adjudicating the patient. This is clear from the following sections of Title 21, D. C. Code (1951):

> Section 312. "Upon receipt of the report and recommendation of the commission, a copy shall be served personally upon the *alleged insane person* . . . together with notice that he has *five days within which to demand a jury trial.* A demand for hearing by the court, or a demand for jury trial for the *purpose of determining the sanity or insanity* of the *alleged insane person* may be made by the said *alleged insane person* . . . or *a jury trial may be ordered by the Court upon its own motion* . . . " (Emphasis supplied)

The words "*alleged insane person*" and the words "*purpose of determining the sanity or insanity*" appearing so often clearly show that the proceedings are only an inquiry and that there is no finality until an adjudication. This is strengthened by the following:

> Section 314. "*If no demand be made for a jury trial,* the *Judge* holding court *shall determine the sanity or insanity of the said alleged insane person,* but such *Judge may* in his discretion, *require other proofs, in addition to the petition and report of the commission,* or *such judge may order the temporary commitment of said alleged insane person for observation or treatment* for an additional period of not more than thirty days. The *Judge may,* in his discretion, *dismiss the petition notwithstanding the recommendations of the commission.* If the Judge be satisfied that the *alleged insane person is of sound mind he shall forthwith discharge such person and dismiss the petition.*"
>
> Section 315. "If the Judge be satisfied that the *alleged insane person* is insane, or if the jury so find, the

Judge *may* commit the insane person. . . ." (Emphasis supplied)

The mere filing of a petition for a writ *de lunatico inquirendo* is not an adjudication nor does it raise a presumption of incompetency. State ex rel. *Bevan* v. *Williams*, 316 Mo. 665, 291 S.W. 481:

> "The filing of an information alleging that an individual is of unsound mind does not render him non sui juris; it raises no presumption of incompetency." (p. 484)

68 C. J. Wills, Sec. 66f, with reference to adjudication as to sanity states at page 460:

> "An adjudication of insanity prior to the execution of the will has been held admissible. While, according to some decisions, evidence of an adjudication of unsoundness of mind after the execution of the will has been held admissible, under other decisions the record of an adjudication of lunacy or of mental unsoundness in a proceeding to set aside an instrument executed by the testator subsequent to the execution of the will is inadmissible at least where the statute regulating inquiries into sanity makes no provision for *retroactive findings*. Likewise, an adjudication after the execution of a will that the testator was incompetent to make a deed has been held inadmissible." (citing cases)

The District of Columbia mental health statute makes no provision for retroactive findings.

In *Barbour* v. *Moore*, 4 App. D.C. 535, 547, the Court said:

> "The incapacity alleged must exist at the time of executing the will. The proof of incapacity at any prior time or subsequent time, while it may furnish evidence reflecting on the condition of the testator's mind at the date of the will, will not relieve the party assailing the will from the necessity of establishing, by clear proof, the existence of the mental incompetency at the time of executing the paper."

Even if Mrs. Geare had been adjudicated—which she was not—the petition for the writ, the affidavits attached thereto, the reports of the Mental Health Commission and the evidence adduced at the mental health hearing would not be admissible in the will contest since the only admissible fact would be the fact of insanity. The leading case on this point is *Leggate* v. *Clark*, 111 Mass. 308, 7 A.L.R. 573, cited with approval in subsequent cases. In that case husband and wife executed a deed while the husband was insane. In Massachusetts this is a void transfer unless a Judge consents. An Order of a Probate Judge *committing* the husband to a mental hospital was admitted in evidence as *prima facie* evidence of insanity. This was held to be error. These insanity proceedings were under a statute which "authorizes judges of probate to commit to either of the state lunatic hospitals any insane person who in their opinion is a proper subject for its treatment or custody". It was contended that since all of the evidence introduced in the proceedings to set aside the deed had been introduced in the insanity proceedings that no one was prejudiced. As to this the Court said (pp. 310, 311):

> "The demandant contends that as all the evidence upon which the judge of probate based his order was subsequently introduced in this case, and as the other evidence tended strongly to show the insanity of Leggate, the tenant was not prejudiced by the admission of the record. But it is impossible for us to say what effect the evidence and the instructions thereon had upon the minds of the jury. They may have had a controlling influence in leading their minds to the verdict which they rendered."

A case similar to the Leggate case is *Kelly* v. *Moore*, 196 U.S. 38, 25 S. Ct. 260, 49 L. Ed. 376, affirming *Kelly* v. *Moore*, 22 App. D.C. 9. Here an action of ejectment was brought in the District of Columbia Court by the grantees of the heirs of William Thomson, in which the will of Thomson was attacked on the grounds of insanity and undue influence. Previous to the execution of the will Thom-

son had been in an insane institution for a short time. He was committed at the request of a cousin and upon the certificates of two doctors. He was in the hospital for six weeks and was granted a leave of absence on probation three weeks before he executed his will. The attesting witnesses testified as to his mental capacity. The Supreme Court said:

> "In this connection exception was taken to the exclusion of the application of James E. Cunningham for the admission of Thomson to the insane asylum, and of the certificate of the two physicians as to his insanity. These were properly excluded, not only because they were unsworn testimony, but because they were given in a different proceeding and upon a different issue. Thomson may have been insane to the extent of being dangerous if set at liberty, and yet may have had sufficient mental capacity to make a will, to enter into contracts, transact business and be a witness. In the case of *Leggate* v. *Clark*, 111 Massachusetts, 308, the admission of similar testimony was treated as error."

In *Lewandowski* v. *Zuzak*, 1923, 305 Ill. 612, 137 N. E. 500, the Illinois Court used the same quotation to exclude the same type of evidence. Here the will was executed March 16, 1916, and *7 days later* on March 23, 1916, deceased was adjudged insane and was committed to an insane institution. The will was admitted to probate in 1919. At the trial the order of the County Court committing testator to the hospital, *including the report of the two doctors appointed by the court* who found testator insane were admitted into evidence. The court held the admission was error for the same reason cited by the Supreme Court.

The Mental Health Commission is not a judicial body and its reports and recommendations are not admissible as shown above, and also upon the following authorities.

In *Universal Airline, Inc.* v. *Eastern Air Lines, Inc.*, 88 U. S. App. D. C. 219, 188 F. 2d 993, an action in negligence arising out of collision of two aircraft. Deposition of Civil Aeronautics Inspector not allowed in evidence. This was held proper and the court said (p. 226):

> "Moreover, the conclusions or opinions of the administrative agencies or boards or any testimony reflecting directly or indirectly the ultimate views or findings of the agency or board are generally held inadmissible because they would tend to usurp the function of the jury. As Wigmore maintains, the phrase 'usurp the functions of the jury' is not accurate, but nevertheless such testimony is inadmissible because it falls within the general rules which exclude hearsay and opinion evidence. The *reports of ex parte hearings and investigations* are generally excluded, not because of danger of 'usurpation of the jury's functions', but because the evidence is improper and irrelevant, *even* if the hearing is before a judge sitting without a jury."

In *State ex rel. Sathre* v. *Roberts*, 67 N. D. 92, 269 N. W. 913, 108 A. L. R. 37, a *quo warranto* proceeding to determine if Roberts was unfitted for a judicial position by reason of his having been committed to a State insane hospital. The following syllabus is by the Court:

> "5. Chapter 23, Sess. Laws 1879, Sec. 2547 to 2579, Comp. Laws 1913, as amended, establishes a hospital for the insane, provides for the organization of a board of commissioners of insanity in each county, and creates a method for determining who are fit subjects for treatment in such hospitals."

> "6. The *findings of the board of commissioners* of insanity *that a person is insane and a fit subject for treatment* in the hospital for the insane has *no bearing upon his legal mental status.* The effect of such finding is to admit one to the asylum for treatment and it is not entitled to the faith and a credit of a judgment of a court, as the *members of such board do not act as judicial officers, but as a special board having special powers only.*"

In *Ex Parte Dubina* (1945) 18 N. W. 2d 902, 311 Mich. 482, habeas corpus proceedings were instituted to obtain release from insane institution. In 1941 Dubina successfully asserted the defense of insanity in his murder trial. At the murder trial the sanity commission, consisting of three psychiatrists, testified that Dubina was not insane. In the habeas corpus proceedings Dubina attempted to introduce the report of the sanity commission to prove that he was sane but the report was excluded. The Court of Appeals held this exclusion correct and said (p. 903):

> "The issue in this present proceeding is the sanity of the appellant at the time of this hearing, not as of the time the original case was tried."

In Re Ryman (1940 Pa. Sup. Ct.) 11 A 2d 677, Ryman was committed on July 12, 1938, to a state insane hospital upon the petition of the daughter and affidavits of two doctors pursuant to the provisions of the Mental Health Act. The petition prayed for appointment of a guardian. Ryman filed an answer denying insanity and demanded a jury trial. The affidavits of the doctors were admitted into evidence and this was held error (p. 680):

> "The Court also seems to have been of the opinion that the Act of the two physicians. . . . in making affidavit that George Ryman's mental condition was such as to warrant his admission to a hospital was an *adjudication* or legal determination of his lunacy. It was not. It was only an ex parte affidavit, which justified the hospital in securing him as a patient, if done in good faith, but it adjudicated nothing as to lunacy. . . . *Affidavits of physicians under the Mental Health Act . . . without further action of the court, are not an adjudication of anything.*" (Emphasis supplied)

The Trial Court did permit cross-examination of Appellee Hodson from the petition and permitted its introduction into evidence. This was proper. The affidavits were not admissions. There was no opportunity for cross-examination of the physicians. The Court did in fact per-

mit Appellants to produce testimony from two St. Elizabeth's physicians Drs. Hobart (Tr. 81 *et seq.*) and Todd (Tr. 91-115) and much of the hospital records from Emergency Hospital (Pltf's. Exhibit 18). At best these affidavits would have been corroborative. There is doubt that Drs. Hobart and Todd should have been permitted to testify for Appellants against the will and deed under Title 14, Section 308 D. C. Code 1951 Ed. supra. But to have added these affidavits would have been further prejudice. As long as Drs. Hobart and Todd were permitted to testify the Court would probably have permitted Drs. Campbell and Cohen to testify had Appellant's seen fit to call them, which they didn't, Drs. Campbell and Cohen being available. In any event the affidavit material was already in the case in other ways.

Point 2. The District Court Properly Excluded the Unsigned Report on Information Containing the Name Dr. Steinkirchner—J. M. W.

The report opens with a note of opinion. (Appellant's App. 32). It then contains information written by someone who was not produced at the trial. It is hearsay on hearsay. Routine entries of observed facts such as pulse, blood pressure, amount of urine voided, etc., are not included. It contains conjecture which is at variance with sworn testimony such as "In September of 1953, the patient had an episode that was possibly a nonparalytic cerebro-vascular accident in which her hands suddenly went limp and cold" (Appellant's App. 33). There is no testimony in the case to support this statement. "During the early months of 1954, the patient seemed to be going more and more into a stupor" (Appellant's App. 33). Even Drs. Hobart and Todd admitted they had no first-hand information or knowledge prior to their examinations of Geare in May, 1954. Hodson denied under oath she had said that Geare had stopped reading in March and April, that Geare had visual hallucinations, or Geare would greet people not there. Appellee Hodson was under strict cross-

examination; certainly she had the same right as to any person seeking to contradict her.

The statement was further inaccurate when it states that Geare went to Emergency Hospital on *February 18*, Geare went on April 18. That was undisputed in the testimony.

The statements along the following lines are already repeated throughout the testimony: that beginning in January, 1953, Geare lost weight; that she was fatigued in 1953; that her appetite fell off; that she had heart attacks in March and April; that she was disoriented and confused while at Emergency Hospital from April 18-30, 1954; that she thought then that she was in San Francisco; that at Emergency Hospital she got out of bed and pulled clothes of other patients; that they then asked that she be removed from the hospital; that on the 30th she was brought to St. Elizabeths. This much was conceded. If error to exclude, it was harmless error.

This statement was properly excluded under *New York Life Insurance Company* v. *Taylor*, 79 U. S. App. D. C. 66, 147 F. 2d 297; *Clairos* v. *United States*, 82 U. S. App. D. C. 278, 163 F. 2d 593; *Palmer* v. *Hoffman*, (N.Y. 1943) 318 U. S. 109, 87 L. Ed. 645, rehearing denied 318 U. S. 800, 87 L. Ed. 1163.

Point 3. The District Court Did Not Err in Its Instructions to the Jury When the Jury Asked for Further Instructions and When the Court Requested the Minority Individual or Individuals to Give Consideration to the Views of the Majority

The Court's charge was proper under the circumstances. After five days of trial with many witnesses and much evidence, the jury retired on the afternoon of Nov. 1. At 5:30 P.M. the jury returned a verdict that decedent had sufficient mental capacity. The jury was polled and each juror responded affirmatively.

The next day around noon the jury requested the Court to reinstruct it on issues 2 and 3, undue influence and revocation and this was done (Appellees' App. 11, 12). Questions of juror No. 8 were answered and at 12:25 P.M. the jury retired. But shortly thereafter at 2:55 P.M., after lunch, they returned stating they appeared to be a hung jury, having been out only the afternoon of November 1 and a little longer than the morning of November 2. The Court was entirely proper in pointing out that the trial had lasted parts of 5 days and cost the taxpayers a considerable amount of money and should be decided if possible. He then made appropriate suggestions pointing out that opinions may change through discussion but each should give deference to views of others and not hold to a blind determination that verdict should represent his view only. On the early afternoon of November 3 the verdict was reached on issues 2 and 3.

Issue 1 on mental capacity had already been decided.

CONCLUSION

A. Case No. 13,201 as to the deed was tried by a judge on the questions of mental capacity and undue influence. His findings of fact should not be disturbed on appeal unless clearly erroneous. Due regard should be given to the opportunity of the Trial Court to judge the credibility of the witnesses and make findings of fact. *Hazen* v. *Hawley*, 66 App. D. C. 266, 86 F. 2d 207, *Strain* v. *Minus*, 123 Conn. 275, 193 A. 754.

In the *Hazen* case, *supra*, the Court said:

> "• • • Under the rule settled in this jurisdiction, while we are not absolutely bound by a chancellor's findings of fact, we do not disturb them on appeal unless upon an examination of the evidence they are clearly wrong (citing many cases) • • •" (p. 271).

The judgment entered by the Trial Court should not be disturbed.

B. Case No. 13,202 concerns the will contest. No harmful error was committed and the judgment on the verdicts below should be affirmed.

Respectfully submitted,

THOMAS M. RAYSOR,
CARLTON L. SAUNDERS,
Attorneys for Appellees.

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APPENDIX

(Filed 2/21/56)

Order Requiring Appellants to File Additional Parts of Transcript of Record Under Rule 75(b) and Extending Time for Filing Record on Appeal and for Docketing Appeal

This case coming on to be heard on Appellees' motion to require Appellants to file additional parts of transcript of record under Rule 75(b) of the Federal Rules of Civil Procedure, and argument thereon, it is by the Court this 21 day of February, 1956,

ORDERED, That the Appellants be and they hereby are required to file additional parts of the transcript of record containing the complete Charge of the Judge to the Jury and colloquy of counsel and the Court relating thereto; and it is further

ORDERED, That the time for filing the record on appeal and for docketing the appeal in this action be and the same hereby is extended for a period of ten (10) days from February 20, 1956, to and including March 1, 1956.

ALEXANDER HOLTZOFF
Judge

Seen:

PAUL B. CROMELIN
Paul B. Cromelin

THOMAS M. RAYSOR
Thomas M. Raysor
Attorneys for Appellees

s/ ARTHUR J. HILLAND
Arthur J. Hilland

s/ THOMAS N. KINDNESS
Thomas N. Kindness
Attorneys for Appellants

(April 14, 1954)

THIS DEED

Made this second day of February in the year one thousand nine hundred and fifty-four, by and between Dorothy Smallwood Geare of the city of Washington, District of Columbia, party of the first part, and Viola A. Hodson, also of said City and District, party of the second part:

Witnesseth, that in consideration of Ten Dollars ($10.00) Dollars the party of the first part does hereby grant unto the party of the second part, in fee simple Lot 83, Square 2061, all that piece or parcel of land, together with the improvements, rights, privileges and appurtenances to the same belonging, situate in the District of Columbia, described as follows, to wit: Lot Eighty-three (83) in Square Two Thousand Sixty-one (2061) with the improvements thereon known as 3047 Porter Street; Northwest, Washington, D. C.

(Stamps)

And the said part of the first part covenant that she will warrant specially the property hereby conveyed; and that she will execute such further assurances of said land as may be requisite.

Witness my hand and seal the day and year hereinbefore written.

DOROTHY SMALLWOOD GEARE (Seal)

In Presence of—
EDNA P. HETZEL
KATIE MAY AYRE

District of Columbia, to wit:

I, Glenn C. Russell, a Notary Public in and for the District aforesaid, Hereby Certify that Dorothy Smallwood Geare who is personally well known to me as the grantor in, and the person who executed the aforegoing and annexed deed, dated February 2, A. D. 1954 personally appeared

before me in the said District and acknowledged the said deed to be her act and deed.

Given under my hand and seal this 2nd day of February, 1954.

GLENN C. RUSSELL
Notary Public D. C.

(Seal)

My Commission Expires Oct. 31, 1955.

THIS DEED

Made this 13th day of April in the year one thousand nine hundred and Fifty-four, by and between Viola A. Hodson of the city of Washington, District of Columbia, party of the first part, and Margaret Hynson Studt, also of said City and District, party of the second part:

Witnesseth, That in consideration of Ten Dollars ($10.00) Dollars, the party of the first part does grant unto the party of the second part, in fee simple an undivided one-half interest, right and title in and to all that piece or parcel of land, in the District of Columbia, described as follows, to wit: Lot Eighty-three (83) in Square Two Thousand Sixty-one (2061) with the improvements thereon known as 3047 Porter Street, Northwest, Washington, D. C. together with the improvements, rights, privileges and appurtenances to the same belonging.

And the said party of the first part covenants that she will warrant specially the property hereby conveyed and that she will execute such further assurances of said land as may be requisite.

Witness her hand and seal the day and year hereinbefore written.

VIOLA A. HODSON (Seal)

In presence of—
PAUL B. CROMELIN
RICHARD L. WALSH

District of Columbia, to wit:

I, Marguerite G. Wimmer a Notary Public in and for the District of Columbia, Do Hereby Certify that Viola A. Hodson of the City of Washington, District of Columbia, party to a certain Deed, bearing date on the 13th day of April, 1954, and hereto annexed, personally appeared before me in said District the said Viola A. Hodson being personally well known to me as the person who executed the said Deed, and acknowledged the same to be her act and deed.

Given under my hand and seal this 13th day of April, 1954.

MARGUERITE G. WIMMER
Notary Public, D. C.

(Seal)

Dorothy Stone 9-15-48
1-16-57

Dep't —

Dep't Exh. No. 5(11)

Notes of accountant for my Executrix

~~At present I am employed by the Navy Dept.~~
~~NCDO P.R.N.C. Navy Central Laboratory, Office~~
~~Potomac River Naval Command, Alexandria, Va.~~
~~under Civil Service, Employee # 810680~~
~~Pay-Tag # 03924~~

~~Any back pay due me, including annual~~
~~leave allowance, will have to be requested,~~
~~from the P.R.N.C. in the form of a claim.~~
allow 1 year

Any money on deposit with the Navy Credit Union, held by the National Metropolitan Bank, 613 15th St. N.W.
Book 5556 10.50 ? due me

I have no Bank accounts, since my experience with a forged check in 1938.

The money accumulating in my Retirement Fund (which will accrue to me upon retirement) is at present designated, under Beneficiary form # 2806-1 (3).

allow 1 year

any money on deposit with the Navy Credit Union, is held by The National Metropolitan Bank, 613 15th St. N.W.

Book 5556 : 10.50 ? due me ?

I have no Bank accounts since my experience with a forged check in 1938

The money accumulating in my Retirement Fund (which will accrue to me upon retirement) is at present designated, under Beneficiary form = 2806-1 (Stamped on my returned carbon copy. "Recd by C.S. Commission 5-17-48")

as a gift to the Protestant Episcopal Theological Seminary of Alexandria, Va. in memory of my parents

Jessie Thomas & Willa Graeme Lockwood my mother. Graeme Thomas Safford my husband. Reginald Wycliffe Gabre.

3047 Porter St NW : Lot 83 Sq. 2061 is at present rented for $100.00 per month. Taxes for 1947 $87.60

Vearie 9-15-48
1-12-54

[illegible] on the 3rd floor [illegible] with Gale
Cook. Rooms next [illegible]
[illegible] Books, Vases, China and [illegible]
of ornamento trim. & furniture are in the NE
basement. The key to the [illegible] Cook
to any [illegible] to the door, in front
[illegible] all other [illegible]

Mrs Vearie's jewelry was [illegible] 5 bet
1936 Have only costume jewelry at
present.

Executors
Mr & Mrs Norman W. Veare,
509 Cambridge apts., Elkan Park,
Phila. 44 Pa.

Mrs Vesta Lovell Haynes, (my cousin) —
Montpelier Road, Barre, Vermont.

My valuable jewelry was pawned & lost in 1936. I have only costume jewelry at present.

addresses

Mr & Mrs Norman W. Geare,
589 Cambridge apts! Allan Park,
Phila. 44. Pa.

Mrs Vista Lovell Haynes, my cousin
Maulfelich Road, Barre, Vermont.

my brothers children all live at
2200 16th N.W. Washington D.C.

T. W. HYNSON
Channing Apts. Wisconsin Ave
Daughter, Mrs Leonard H STUDT
1624 Spring Rd. N.W.
Miss Viola A. Hynson
1805 Kenesaw Ave N.W. Washington D.C.

Of course all this is uncertain I may live so long that all of these things may be sold and you will not be troubled by any of it -

Most gratefully

Dorothy Gore

7-20-48

1-16-54

(Filed Jan. 18, 1955)

1805 QUINCY STREET, NORTHWEST
WASHINGTON 11, D. C.

February 17, 1954

Mrs Frank A. Hodson
1805 Quincy Street, N. W.,
Washington 11, D. C.

Dear Vi:

I am writing this memo in order to facilitate your work in disposing of my tangible personal property mentioned in Item "IV" of my Will dated February 2, 1954.

First I wish to express to you, my devotion and gratitude for your love and care, and above all for your unfailing faith in me. Many times when all the World seemed black you have boosted my spirits and given me a new outlook on life. I shall be ever grateful for all you goodness to me.

The years since I came to you, in March 1942, have been happy ones. As I have told you I have lived in your home longer than any place since I was born, July 5, 1889. I wish to thank Frank for all of his understanding care that has really made me feel secure in your home. Katie and Edna too, share in my grateful thanks. They have been wonderful understanding friends, and I love them dearly.

Now to my reason for this memo. First I wish to state that my valuable jewelry was pawned and lost in 1936. I have only costume jewelry at present.

I have given you, from time to time, my silver and china; but if there is any left I want you to have it, together with all of the furniture, furnishings, boxes of books, ornaments, and contents of trunks, not already disposed of, stored in the basement of my house 3047 Porter Street, N. W., including all furniture of the house, to dispose of or keep as you desire.

I would like Marguerite Weller Hynson to have my Pi Beta Phi pin; Katie Ayre my new two-stone zircon ring, and Edna Hetzel to select some costume jewelry. The rest

is to be divided between Marguerite Hynson, her daughter Margaret Studt and you, Vi. Selection to be made in the order named, or divided as you see fit.

I hope you will be able to distribute the specifically named articles to the within named persons, provided they are living. I not living please dispose of any or all as you see fit.

To Frank Hodson please give my coin collection to add to his, and to Katie Ayre, all of my wearing apparel, including my fur coat. A silver on copper tray with the "Geare" coat of arms, I would like to go to Norman Geare, if he cares to have it.

A silver vase, given my mother in 1911, when she retired as State Regent of the District of Columbia Daughters of the American Revolution, I would like placed in the D A R Chapter House on Massachusetts Avenue, if you think they would like to have it.

To the children of my brother, namely, Grahme T. Smallwood, Jr., Elizabeth Anne Wier and Eleanor Warrene Beasley such photographs or family mementos they might desire, should they evidence any interest, but doubt that they will do so.

Any photographs, albums or scrappbooks not selected by my nieces and nephew, are to be given to my cousin Vesta Lovett Haynes of Barre, Vermont, if she cares to have them. I would also like her to have the small gilt spool mirror hanging in my room in your home.

Any thing I have not mentioned here I am sure you will see has the proper resting place. Of course all of this is uncertain as I may live long enough to dispose of these things and you will not be troubled by any of it.

Thanks dear from a most grateful and loving heart,

Always lovingly,

DOROTHY S. GEARE
Dorothy S. Geare

Excerpts From Transcript

38 (The jury was polled on Issue No. 1, and each juror responded "Yes" as his name was called.)

* * * * * * * * * * *

Issue No. 2 is a question whether the will was obtained by undue influence. I want to repeat that undue influence does not mean every kind of persuasion or every kind of influence. Influence gained by kindness or by affection is not undue influence, if no fraud or no imposition is practiced. Legitimate persuasion and argument is not undue influence.

For example, a person has a right to argue, if he wants to, when a person is making a will, that he should be mentioned in the will, and he may make his claim either on kinship or friendship or kindness or service or on need or any other consideration. So long as fair and legitimate and honest argument is used, which does not go to an oppressive degree where it becomes coercive, any such influence is not undue influence and it is perfectly legal.

In order to constitute undue influence, it is influence exerted by improper practices or oppression or coercion, or imposition or fraud, to such an extent that the mind of the person making the will is overcome, the free agency of that person is destroyed and the will does not express the real intentions and the real desires of the person making the will, but the intentions and desires of another person.

Unless you find that there was influence in this case to the extent that I have indicated, to the extent that the mind of the testatrix was completely overcome and her free agency destroyed by mental oppression or coercion or imposition or fraud, or in some other way, there is no undue influence.

Now, of course, undue influence, just as any other fact in any other case, may be proved by circumstantial evidence. It does not have to be proven directly. It may be a matter of inference. But, nevertheless, mere possibility or suspicion of undue influence is not enough.

On the issue of undue influence the plaintiffs have the burden of proof. They have the burden of proving undue influence by a fair preponderance of the evidence. And if the plaintiffs fail to make that proof, or if the evidence is evenly balanced, then the verdict must be for the defendants.

There is one other circumstance. To be sure, if a confidential relationship is established between the testatrix and the person mentioned in the will, and it is established that the person mentioned in the will was instrumental in procuring the preparation and the execution of the will, then the law calls upon the person mentioned in the will for some explanation, and it is for you to decide whether the explanation is satisfactory.

Mrs. Hodson gave a long explanation as to how the will came to be executed in the way it was executed. If her story is true, there was no undue influence. You have the decision of the question as to whether her story is true. You have seen her testify, you have heard her testify, and some of the other witnesses corroborated certain of the details of her testimony. If you are satisfied with her testimony and with her explanation, then there is no undue influence and your verdict should be in favor of the defendants.

To summarize, undue influence is not just any kind of influence. It is not influence gained by kindness or affection or legitimate argument; but it is an influence that coerces the other person's mind, by imposition or fraud or oppression or in some other way, so that that person's free will is completely overcome. And on this issue, as I said before, the plaintiffs have the burden of proof.

Of course, if you find that undue influence, as I have defined it, was the procuring cause of the will, then your answer should be "Yes" to question No. 2. But if you find that the plaintiffs have not proven undue influence, by a fair preponderance of the evidence—again the finding of undue influence as I have explained it—then your answer should be "No."

So much for Issue No. 2.

Now, then, on revocation. In order to revoke a will, as I explained to you yesterday, two things must concur. First there must be some physical act of revocation, such as a tearing. Second, there must be mental intention to revoke the will. In other words, the physical act of revocation must have been performed with an intention to revoke. Otherwise there is no revocation.

For instance, if a person by accident tears his will, and says "Well, now, I did it accidentally; I thought I was tearing up some other document," that does not revoke the will. The will can be probated and it is perfectly valid. But if he tears it, intending to revoke it, that of course is revocation.

In this case the will was executed in duplicate. Both the original and the carbon were executed. The undisputed testimony is that at some later date the testatrix tore the carbon copy. The original remained intact. The question for you to determine is, Did the testatrix intend to revoke the will when she tore the carbon copy?

The only testimony on that issue is the testimony of Mrs. Hodson. She testified that Mrs. Geare, the testatrix, was tearing some other papers and that this carbon copy was folded in or held with the other papers and was torn by Mrs. Geare accidentally; and Mrs. Geare immediately saw her mistake and right then and there the carbon copy was patched up with scotch tape. You have a right to reject or to accept this testimony. If you accept it, there is no revocation. And that testimony is not denied. You also have a right to consider that the original remained intact.

On the issue of revocation, again, the burden of proof is on the plaintiffs to establish that the will has been revoked, by a fair preponderance of the evidence. If the evidence is evenly balanced, the verdict must be for the defendants. In other words, if you are convinced that there was no intention to revoke, then of course there is no revocation. But if you find that the evidence is evenly balanced, you must also

find that there is no revocation. Your duty to find revocation is only if it is established by a fair preponderance of the evidence that there was intention to revoke the will when the carbon copy was torn.

Now, then, Issue No. 3 is a question as to whether the will was revoked. If you find that it was revoked, bearing in mind my instructions on the law, then your answer will be "Yes." If you find that the will was not revoked, or if you find that the evidence is evenly balanced, then your answer will be "No."

. . . . . .

59 (The jury was polled on Issue No. 2 and Issue No. 3, each juror being asked to state his individual verdict as to each issue, and each juror responded "No" to each of those two questions.)

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FILED
AUG 12 1957
JOHN T. FEY, Clerk

No. 362

APPELLEES' SUPPLEMENTAL APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consolidated Cases Nos. 13,201 and 13,202

GRAHAME THOMAS SMALLWOOD, JR., ET AL., *Appellants*,

v.

VIOLA A. HODSON, ET AL., *Appellees*.

Appeal from the United States District Court for the District of Columbia

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United States Court of Appeals
For the
District of Columbia Circuit
FILED NOV 30 1956
Joseph W. Stewart
CLERK

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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PLAINTIFFS' EXHIBIT NO. 18

(being all excerpts read by Plaintiffs' attorney from the official records of Central Dispensary and Emergency Hospital)

HOUSE OFFICER'S CASE SUMMARY

Name: Greare, Mrs. Dorothy.
Pt. disoriented and confused, unable to get any history.
Transferred to St. Elizabeth because of psychosis.

CENTRAL DISPENSARY AND EMERGENCY HOSPITAL

Name: Geare, Mrs Dorothy.
Admitted: 4/18/54 Discharged: 4/30/54 Days: 12
Condition on Discharge: Unchanged—

CENTRAL DISPENSARY AND EMERGENCY HOSPITAL

History

History No. 164824
Name: Geare, Mrs. Dorothy Age: 64 Sex: F.
Occupation: Retired.
Pt. disoriented and confused—unable to give any history.

THE CENTRAL DISPENSARY AND EMERGENCY HOSPITAL
Washington, D. C.

Name: Geare, Mrs. Dorothy Room: 742 Hist. No. 164824
Age: 64 Sex: F. Occupation: Retired
A 64 year old white housewife—looking older than stated age—in no acute distress—disoriented and confused—slightly built—rather emaciated.

NURSES NOTE SHEET

Date and Hour A.M. or P.M.	Treatments and Remarks
4/18/54	
4:05 p.m.	Pt. admitted to Room 242 via ambulance. Put to bed.
5:30	Soft diet. Ate very little—seems very confused.
9:30	Some better but still confused.
Monday, April 19, 1954.	
12:00 midnight	Pt. out of bed. Voided in bed—
1:30 a.m.	To bathroom—Out of bed—Climbs over bedside rails—Appears unable to reason with—
5:30 a.m.	Urinated in bed—Climbed over side rails to bathroom. Does not put light on—Linen changed and assisted back to bed
7:30 a.m.	Complete bed bath. Pt. seems quite confused.
Tuesday, April 20, 1954	
12:00 midnight	Pt. still sitting up in bed. Coughing.
7:30 a.m.	Pt. very drowsy some confused.

Friday, April 23, 1954
10:45 p.m.—Climbed out of bed—put back. Is very confused at present.

Saturday, April 24, 1954
1:00 a.m.—Trying to get up thru' side rails—confused.

April 27
4-27-54—Pt. seemed very confused in talking. Pt. wheezing has coughed frequently during night. Slept only at short intervals. More coherent this A.M.
9:00 a.m.—Some confused.
11:00 p.m.—Condition seems unchanged

April 28
2:00 a.m.—Awake and cough. Taken to B.Room—G.S. quite confused. States she "is glad to be home again"—

April 29
10:00 p.m.—Voided in bed.
11:30—Wide awake—Talk is confused—

Friday, April 30
3:15 a.m.—Helped to B.Room. Confused—has not slept.

CENTRAL DISPENSARY AND EMERGENCY HOSPITAL

Admitted: 10-5-54 Discharged: 12/28/54

History No. 169032
Name: Geare Dorothy S. Mrs. Age: 65
Occupation: None —Auditor in the Navy Retired
M.S.(W.)D.

CC—High blood pressure 190/110

PI—Up till 5 years ago Pt. was very healthy in fact had never known a sick day in her life.

At that time noticed that her eyes were bad so consulted practitioner who told her she should leave work for 6 months which helped a lot.

Then returned to work and was able to work on until December last year.

During last 8 months has been well except for nervous spells of crying, a little short of breath during the last 10 months. Before that was short of breath only when walking up stairs.

No pain anywhere.

Little white things in urine. Has been urinating at night only for about 3 days. Considerable swelling of both legs. Had venous ligation last year (Dr. Veal).

PH—Childhood—no other—P and A—appendectomy—venous ligation—Habits—Used to smoke till recently—Used to drink—Drugs—as given by MD to sleep for 15 mos. Allergies—no known.

This is an emaciated white female who looks her age, is in good spirits but seems just mildly confused mentally.

BP—210/145
T—98°
P—92
R—24
BP—215/115

NURSES NOTE SHEET

10-5-54
3:00 p.m.—Pt. admitted to Room 530 via wheel chair.
3:30—Retention on catheter.
6:00—Pt. mildly confused mentally. Crying, afraid to be alone in the room.

Wednesday 10-6-54
1:00 a.m.—Trying to get out of bed—some dyspnea.

October 6, 1954
5:45 a.m.—Rotating tourniquet applied.
10:50 a.m. Complaining unable to breathe.

Thursday, October 7, 1954
1-7:00 a.m.—More comfortable night. Took glass milk. Pt. P.... Foley Catheter 400cc. of bloody urine.
8:00 a.m.—Cont. oxygen.

3:00 p.m.—Cond. same.
3:11 a.m.—Routine p.m. care. Pt. unable to breathe.

Friday, October 8, 1954
7:00 a.m.—Oxygen const.—but still some dyspuea. Expelling flatus.
3:00 p.m.—Appears quite confused.

Saturday, Oct. 9, 1954
7:00 a.m.—Pt. confused and somewhat noisy.
3-11:00 p.m.—Pt. seems confused. Thinks people are staring at her. Turns light on frequently.

Sunday 10-10-54
3:00 a.m.—Awake—Seems confused mentally.
7:30 a.m.—Pt. dyspuea—confused and restless—
11:30 a.m.—Seems very confused. Turns on light but does not want anything
2:30 p.m.—Has been quite confused most of day.
3:00 p.m.—Pt. pulled foley catheter out—Pt. very confused.
9:00 p.m.—Trying to crawl over side-rails.

Monday, October 11
2:00 a.m.—restless, attempting to get out of bed.
8:00 a.m.—Confused. Trys to get over sides. Pulled out cath.
2:30 p.m.—Still confused, restless
3-4:00—Still confused restless and talking incoherently
5:00—Soft diet. Had to feed but took her diet poorly

Tuesday, October 12
2:30 a.m.—Slept at long intervals. Confused when awake.
3-11:00 p.m.—Pt. seems confused. Soft Diet partially—taken. Seems very talkative at intervals.

Friday, October 14
8:00 a.m.—Confused and disoriented.

Monday, October 18
8:00 a.m.—Disoriented.
3-11:00 p.m.—Talking out at intervals—very incoherently

Tuesday, October 19
7:30 a.m.—Disoriented

Wednesday, October 20, 1954
8:30 p.m.—Crying and confused

Wednesday, October 27
8:00 a.m.—Confused.
11:00 p.m.—Cond. critical.

10-28-54 Thursday
6:00—No apparent change in condition, respirations shallow, very listless. A poor night.
6:30—Apparently weaker, does not respond to questions.
8:00—Responds, alert, confused and disoriented.

Saturday, October 30
7:30 a.m.—Confused and disoriented.
3-11:00 p.m.—Pt. very noisy.

Sunday, October 31, 1954
7:30 a.m.—Confused.

November 2
Seems quite disorientated this evening

November 5
Continues to be confused.

Saturday, November 6
3:30 p.m.—Pt. looks very poorly.

Wednesday, November 10
8:00 a.m.—Confused.
2:15 p.m.—Quite noisy.

Thursday, November 11, 1954
8:00 a.m.—Confused and disoriented.
3-11:00 p.m.—Condition poor.

Tuesday, November 16
7:00 a.m.—Confused.

Monday, November 22
3:00 p.m.—Seems confused.

Thursday, December 2
7-11:00 p.m.—Very nervous and loud.

Saturday, December 11, 1954
3-11:30 p.m.—Seems quite disorientated.

December 12
3-11:30 p.m.—Pt. very restless et quite noisy most of the afternoon—

December 13
9:30 p.m.—She started convulsing—arms and neck still—rather gigantic—pulse remained unchanged—Seizure lasted approx. 3 min.—After seizure color became normal—but Pt. is more disoriented than before is able to move about as well as previously.
11:00—Trying to get out of bed—
2:00 p.m.—Very confused and restless.
3:00—Condition remains poor.

Tuesday, December 14, 1954
3-11:30 p.m.—Very noisy et talkative.

Wednesday, December 14, 1954
7:00—Pt. very confused.

Friday, December 17, 1954
7-3:00—Pt. very confused.

Monday, December 20, 1954
11-7:00—Still confused—

December 22
3-11:30 p.m.—Apparently confused.

Sunday, December 26, 1954
8:00 a.m.—Unable to take breakfast—unconscious—

Monday, December 27, 1954
8:00 a.m.—Bath—Pt. unconscious—

United States Court of Appeals
For the
District of Columbia Circuit
FILED JUN 12 1957
Joseph W. Stewart
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No. 362

IN THE

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

Office - Supreme Court, U.S.
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Consolidated Cases Nos. 13,201 and 13,202

GRAHAME THOMAS SMALLWOOD, JR., ET AL.,
Appellants,

v.

VIOLA A. HODSON, ET AL., *Appellees.*

PETITION FOR REHEARING

The appellants respectfully petition the court to order that the above-entitled appeal be reheard, and as grounds therefor say:

1. It is not factually correct for this court to state that the substance of the affidavits of the two (2) doctors was repeated in the lunacy petition signed and filed by the defendant-appellee Hodson, and it is not correct to state that the affidavits would have added nothing to the record as admissions by Mrs. Hodson against her interest. The allegations of the petition were as follows:

> "5. Petitioner states that the mental condition of respondent has progressively worsened since her retirement from United States Government Service in July, 1953. She is unable to care for her person. She is confused and imagines that she is in San Francisco. Petitioner believes that respondent is incapable of

managing her own affairs and is not fit to be at large, or to go unrestrained and, if permitted to remain at large, the rights of persons and property will be jeopardized and, further, that respondent is a fit subject for treatment because of her mental condition." (Appellants' App. 24)

The affidavit of Dr. Neil P. Campbell contains the following statements:

"* * * that he is a citizen of the United States and a resident of the District of Columbia, residing at 1409 Newton Avenue, N. W.; that he is a physician and has Dorothy Smallwood Geare under his care and treatment at the present time; that he has observed Mrs. Geare for some months and found that her mental condition has progressively worsened; that her mental condition has deteriorated markedly since her retirement from Government employment last year; that she is disorientated and confused; that she is incontinent and has elevation of blood pressure; that she suffers from Cerebral Arteriosclerosis. It is my opinion that Dorothy Smallwood Geare is of unsound mind, incapable of managing her own affairs and not fit to be at large or to go unrestrained and, if permitted to remain at liberty, the rights of persons and property will be jeopardized; it is my opinion that Mrs. Geare is a fit subject for treatment because of her mental condition." (Appellants' App. 26)

A comparison of the foregoing discloses that the petition itself, which was before the court and jury, did not disclose (1) that Mrs. Geare had been under the care and treatment of a physician for some months or (2) that her physician had found (a) that her mental condition had progressively worsened, (b) that her mental condition had deteriorated markedly since her retirement from Government employment in July, 1953, (c) that she was disoriented and confused, (d) that she was incontinent and (e) had elevated blood pressure and (f) that she suffered from cerebral arteriosclerosis. These findings by Dr. Campbell did not appear in the petition. Furthermore, the

petition did not contain the opinion of Dr. Campbell that Mrs. Geare was of unsound mind, incapable of managing her own affairs and not fit to be at large or to go unrestrained and, if permitted to remain at liberty, rights of persons and property would be jeopardized, and that Mrs. Geare was a fit subject for treatment, because of her mental condition. The petition contained only the opinion of the appellee in the latter regard. It was one thing to have before the court and jury an admission by the appellee that in her opinion Mrs. Geare was of unsound mind at a time near the execution of her will and deed, but it would have been quite another thing to have had before the court and jury her admission that two competent physicians, one of whom was her attending physician, had expressed the opinion that Mrs. Geare was of unsound mind.

The trial judge did not exclude the affidavits of the doctors on the ground that they "would have added nothing to the record as admissions by Mrs. Hodson against her interest—". He excluded them on the ground that they were not admissions by Mrs. Hodson against her interest. (Appellants' App. 23). This is the point presented by this appeal, and this court has not considered or decided it.

The affidavits of the doctors, especially that of Dr. Campbell, would not have been merely cumulative but would have been additive evidence, not only because they stated more than the petition stated but also because they contained statements and opinions of competent physicians, whose statements the appellee had adopted. Statements and opinions of competent physicians admitted by Mrs. Hodson, might have had more weight with the jury than her own statements and opinion. How can anyone conclude from the record that these additional admissions by the appellee by reference and adoption would not have led the jury to a different verdict concerning Mrs. Geare's testamentary capacity? Both the substance and source of these additional admissions by the appellee might well have carried more weight with the jury than the petition

itself. The lunacy statute gives recognition to this contention by providing that the petition itself is insufficient for any action by the District Court and must be accompanied by two (2) supporting affidavits of competent witnesses before the District Court can take any action.

2. This court did not decide the question presented by this appeal (Appellants' App. 10 and 19, and Appellants' Supplemental App. 2-4) that the District Court erred in excluding the hospital record of statements made by the testatrix herself at the hospital as follows:

> "* * * she was taken from her home, where she lived alone, and brought here. Does not know why. She doesn't realize she is sick. She states she has been working in a store. She knew her husband died 30 years ago. She has no children, but some nieces and nephews. She is quite cooperative, pleasant, answers questions readily. At times she is incoherent. Shows gross memory defects, and is disoriented." (Appellants' Supplemental App. 4)

The opinion of this court is entirely silent concerning this question to which the court's attention was specifically called in the oral argument when counsel for appellant explained the reason for Appellants' Supplemental Appendix. A determination of the admissibility of the hospital record of these statements by the testatrix herself involves entirely different considerations than the admissibility of the hospital record of the statements made to a hospital doctor by the appellee. This court's opinion ignored this vital question involving reliable evidence made by a disinterested person in the ordinary course of the hospital's affairs and business. In new York Life Ins. Co. v. Taylor, 79 U.S. App. D.C. 66, 69-70, 147 F.2d 297, this court said:

> "* * * The Supreme Court has stated that the test of admissibility must be 'the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation.'[9] * * *"

[9] Id., 318 U.S. page 114, 63 S. Ct. page 480, 87 L. Ed. 645, 14 A.L.R. 719."

This evidence is the very kind of evidence that the Federal Shopbook Rule made admissible. Its exclusion was erroneous. Its exclusion was prejudicial. How can anyone conclude from the record that the jury would not have reached a different verdict, if the jury had learned from this reliable source of evidence that at a time near the making of the will and deed, Mrs. Geare did not know that she had been taken from Emergency Hospital, and not from her home, to Saint Elizabeth's Hospital, did not know that she lived with many people and not alone, did not know why she was taken to Saint Elizabeth's Hospital, did not realize she was sick, thought that she had been working in a store when as a matter of fact she had worked for the Federal Government and had been retired on account of her illness?

3. It is not factually correct for this court to state that an effort could have been *but was not made* to elicit testimony from Mrs. Hodson on the matters recited in her statements appearing on the hospital record. The fact of the matter is that an effort was made to elicit testimony from her on the matters recited in the hospital record of her statements, and her answers were, "I don't remember" or "I told you I don't remember." (Appellants' App. 31-32)

A witness cannot be contradicted for the purpose of impeachment or any other purpose where the witness has made no assertion on either direct or cross-examination. No contradiction can be involved where there has been no assertion. See III Wigmore on Evidence, Third Edition, Section 1038, pages 723-724.

This court's opinion places counsel for the appellants in a false light. It indicates that through ignorance or neglect, counsel for appellants failed to do something that could have been done, when the truth of the matter is, as shown above, counsel actually did what this court states "could have been" done; namely, an effort to elicit testi-

mony from Mrs. Hodson on the matters recited in the hospital record of her statements. This court's further statement that "if her testimony was inconsistent with the statement, appropriate steps could have been taken to attempt to discredit her, as by calling the doctor" also implies that Mrs. Hodson was not interrogated on her statements shown on the hospital record, when the truth of the matter is that she was interrogated but gave no testimony inconsistent with her former statements. When counsel for appellants attempted to insist upon an answer, other than "I don't remember" or "I told you I don't remember," the following occurred:

> "The Court. If she says she does not remember, then she can neither affirm nor deny." (Appellants' App. 31)

Counsel for appellants offered the hospital record of Mrs. Hodson's statements as evidence of facts admissible under the Federal Shopbook Rule and the decision of this court in *New York Life Ins. Co.* v. *Taylor, supra.* The hospital record was admissible generally for the purpose of proving testamentary incapacity, even if not admissible to impeach Mrs. Hodson. (Appellants' App. 28-30, and 35) This point is presented by this appeal, and this court has not considered or decided it.

With respect to the hospital record of Mrs. Hodson's statements, the trial judge recognized the existence of a substantial question concerning admissibility. The following occurred in the trial court:

> "The Court. Tell me what your objection is.
>
> Mr. Raysor. My objection is, this is offering the document itself.
>
> The Court. Yes, I know; but what is the basis of your objection?
>
> Mr. Raysor. It is hearsay. If isn't sworn. There are no witnesses available. It is not the best evidence.

The Court. Oh no; that is not a good ground. I presume Mr. Hilland is offering it on the basis that it is a record kept in due course of business, under the Federal Shopbook Rules.

Mr. Raysor. Yes. I have examined those authorities at length and, as I understand the rule, it is that matters of opinion, merely routine statements and dates, and things of that sort, are admissible.

Mr. Hilland. That is all I am offering.

The Court. I am going to sustain the objection. You know, there are divergent rulings in different circuits on the Federal Shopbook Rule. The Second Circuit has a much more liberal interpretation of the Federal Shopbook Rule than this circuit has. I think in the Second Circuit this would be admissible. But in New York Life Insurance Company versus Taylor, and in a subsequent case of United States against Clainos, our Court of Appeals has limited the Federal Shopbook Rule to routine clerical entries. A statement of what somebody tells the person who keeps the record, except for purely routine facts, is not, in my judgment, within the Court of Appeals opinions.

Mr. Hilland. I thought, Your Honor, it was within the New York Life Insurance Company case.

The Court. I don't think it is now. For instance, what is within the New York Life Insurance Company versus Taylor case would be entries showing date of admission, temperature, pulse, blood pressure, or symtoms like the patient seemed dazed or incoherent; but anything beyond that would not be a routine clerical entry. If somebody accompanying the patient said the patient had been ill for so many days, I wouldn't think that would be routine.

Mr. Hilland. Isn't this admissible as an admission against interest by this witness? What I am offering here is what she told.

The Court. That is why I say you have a right to ask her 'Did you say so and so?' 'Did you say so and so?' And if she denies she did, you have a right to show it to her and ask her if this doesn't refresh your recollection. If she say no, you have a right to

subpoena the person who made this record and ask that person whether she made these statements.

But this is not a document that proves itself as a document made in due course of business, because of the Clainos interpretation of the Federal Shopbook Rule by our Court of Appeals. And you know the Supreme Court of the United States, in Palmer versus Hoffman, put a rather narrow interpretation on the Federal Shopbook Rule. That case involved a railroad accident and the plaintiff sought to place in evidence reports of the employees of the railroad company, from the company's files. Justice Douglas, I think it was, said those were not records kept in the due course of business, because the business of the company is to run a railroad, he said, and not to litigate.

I am going to sustain the objection. But you are free to proceed along the line I have indicated." (Appellants' App. 29-31)

Counsel for appellants then made an effort to elicit testimony from Mrs. Hodson on the matters recited in the hospital record of her statements. The result of that examination was as hereinbefore shown.

4. The foregoing points numbered 1, 2 and 3, show that it is necessary for this court to decide the questions involving (a) the exclusion of the two doctors' affidavits, particularly the affidavit of Dr. Neil P. Campbell, and (b) the exclusion of the hospital records relating to (1) the statements of the testatrix herself and (2) the statements of the defendant-appellee Hodson. Rule 61 of the Federal Rules of Civil Procedure has no application to a correct statement of the facts of this case. The supposed factual foundation upon which this court applied that rule and found it unnecessary to decide these questions of exclusion of evidence, is without support in the record.

5. The record shows that in Case No. 13,202, the trial judge's handling of the jury and his supplemental instructions to the jury on numerous occasions after the

case had been submitted to the jury did adversely affect the substantial rights of the appellants.

Obviously the verdict was not the result of the jury's deliberations. It was returned only three minutes after the court instructed the jury the last time to return to the jury room. That much time is required for a jury to file out of the jury box and into the jury room and out of the jury room and back into the jury box. (Appellants' App. 47)

Consider what had transpired immediately preceding those three minutes. The jury was given the Allen Charge in full, and more, emphatically, for the third time. (Appellants' App. 44-45) Then the jury was told that "a decision has to be reached by a jury, and you are that jury." (Appellants' App. 45) Then the jury was given some more of the Allen Charge again. (Appellants' App. 45) Then the trial judge inquired, "Now, is there anything else that *any member* of the jury would like to ask the Court?" Thereupon the foreman of the jury undertook to high pressure one juror by informing the trial judge that "one member of our panel would like to ask a question." One of the "lady jurors" indicated that she did not wish to ask a question, and the foreman had to admit that he was mistaken. But he succeeded in singling out that juror, to her embarrassment. (Appellants' App. 45-46) The lady juror, Juror Number 8, previously had indicated to the court that she lacked confidence in Mrs. Hodson's credibility. (Appellants' App. 37-38) In response to that point made by her, she had been instructed, among other things:

> "Confine your thinking and your consideration to the two questions that you have to decide, and don't go off on tangents on other matters. Just confine yourself to these questions. And in order to concentrate your mind on them, I'm going to read them again. Issue No. 2:" (Appellants' App. 38)

Then the trial judge read the two issues. After reading the two issues and telling the jury the form their answer should take, the trial judge again said, "And concentrate on that and don't give any thought to any extraneous matters." Later he said again, "And again concentrate on that specific question and do not consider any extraneous matters." Then he said, "Have I answered your question?" And Juror No. 8 said "I think so." (Appellants' App. 39)

From all that transpired on that occasion, Juror No. 8 and other jurors, could have concluded that what the judge said was tantamount to telling Juror No. 8 to consider Mrs. Hodson's perjury an extraneous matter. (Appellants' App. 37-39)

What Juror No. 8 wished to be informed about was the legal effect of Mrs. Hodson's perjury in the lunacy petition. What the trial judge said in response to that question, could have led Juror No. 8 and other jurors to conclude that Mrs. Hodson's perjury in the lunacy proceeding was an extraneous matter. See *Blunt* v. *United States*, Cases Nos. 13,294-5-6, in this court, decided April 18, 1957.

The trial judge refused to accept the report of the jury that it appeared to be a hung jury and that all members affirmed their decisions on Issues No. 2 and 3. The trial judge said, "Well, I am quite sure this is not a hung jury. I am not going to accept this statement, ladies and gentlemen of the jury. This trial took about three or four days. It cost the taxpayers a considerable amount of money. In fact, it has taken parts of five days, and the case should be decided." He said more and then gave the Allen Charge in full and more, emphatically. He told the jury "I see no reason why you should not promptly reach a verdict." (Appellants' App. 39-41) Immediately after all this transpired he allowed the jury to deliberate only three quarters of an hour and then on his own motion, had the jury brought into the courtroom and asked the foreman to "in-

form the Court what progress you are making towards arriving at a verdict. Are you likely to have a verdict very shortly?" It was only 3:45 p.m., and, after deciding that he would release the jurors until the next morning, he gave the Allen Charge again, fully and emphatically. In fact, as on other occasions, he gave the jury more than the approved Allen Charge. (Appellants' Brief 25-31) On that day, November 2, 1955, in a period of fifty-five minutes between 2:55 p.m. and 3:50 p.m., the jury was given the Allen Charge and more, fully and emphatically, twice. (Appellants' App. 39-43)

When the jury returned to the courtroom on November 3, 1955, at 2:45 p.m., the jurors had been deliberating for parts of 3 days or a total of 14 hours. The trial judge previously had refused to accept its report that it was a hung jury. By that time the majority was high pressuring the minority. The court received a note from the foreman reading as follows:

> "We, the jurors, request that we be reinstructed regarding our responsibilities to get together on a unanimous verdict." (Appellants' App. 44)

It was also on this same occasion that the foreman was high pressuring one juror by singling her out as a juror who wished to ask a question, and then admitted he was mistaken. (Appellants' App. 44-46) The trial judge said he had "a feeling that there must be one, two or three jurors that are standing out against the balance." (Appellants' App. 47) His handling of the jury and his supplemental instructions to the jury certainly indicate that he felt that way and that he was determined to force the minority to yield to the majority. In fact, upon the request of counsel for the appellants, the trial judge refused to tell the jurors that no individual juror need give up his own convictions. (Appellants' App. 46) He succeeded in forcing the minority to yield, after indicating that the jurors must reach a verdict, and that he was not going to

accept a hung-jury report and was not going to discharge them until they reached a unanimous verdict.

In *Stewart* v. *United States*, 300 F. 769, 785, Judge Sanborn said for the court:

"(13) The second question presented by the exceptions now under consideration here is: Was the supplemental charge and the reading of the excerpt from the opinion of the Supreme Court in Allen v. United States error? The excerpt from that opinion was not any part of the charge to the jury in that case, nor did the Supreme Court recommend that excerpt as a fit charge to the jury under such circumstances as existed in that case or in this. The supplemental charge to the jury under like circumstances in Allen's Case was 'taken literally from a charge in a criminal case which was approved of by the Supreme Judicial Court of Massachusetts in Commonwealth v. Tuey, 8 Cush. 1, and by the Supreme Court of Connecticut in State v. Smith, 49 Connecticut, 376, 386.' 164 U. S. 501 (17 Sup. Ct. 157). It was in substance the same charge which, under like circumstances, was given to the jury in United States v. Allis (C. C.) 73 Fed. 165, 182, which was sustained by the Supreme Court in Allis v. United States, 155 U.S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91, and which received the approval of this court as stating 'the proper limitation of the authority of a trial court when a jury is having difficulty in reaching a verdict,' in St. Louis & S. F. R. Co. v. Bishard, 147 Fed. 496, 500, 78 C. C. A. 62. If the court below had given that charge, it would have avoided the question now under consideration. That charge contained these statements:

'The court does not desire that any juror should surrender his conscientious convictions. On the other hand, each juror should perform his duty conscientiously and honestly, according to the law and the evidence. And although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring 12 minds to a unanimous result, you must examine the questions submitted to you with candor,

and with a proper regard and deference to the opinions of each other.'

"Compare these statements with those relating to the right and duty of each individual juror to render a verdict according to his own conscientious convictions with these on this subject in the supplemental charge and in the excerpt read to the jury below, 'Of course, you are to understand that the court desires in no wise to influence you at all in respect to a verdict but simply to emphasize the fact that if you can consistently and by consultation with each other reach a verdict, * * * and if a verdict can be conscientiously arrived at, it is highly desirable,' and in the excerpt from the opinion of the Supreme Court in the Allen Case, which was read to the jury by the court below, and which it told them was addressed to their judgment and conscience, and then directed them to retire and make an earnest effort to see if they could agree in the case, to wit:

'While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself.'

"This paragraph of the opinion in Allen's Case, as we have said, was no part of the charge of the court in that case, but it was a part of the argument of the Supreme Court in support of the standard and approved charge in that case, and it was intended to show the absurdity of a stubborn refusal by a juror

to listen to the arguments of his fellows, or to consider anything but the conclusion he had reached before the jury retired to deliberate. There was no evidence in this case that any juror had not listened with deference to the arguments of the majority, or that any juror went to the jury room with a blind determination that the verdict should represent his opinion of the case at the time he entered that room, or that any juror had closed his ears to the arguments of men who were equally honest and intelligent with himself. The legal presumption was and is that each juror had listened deferentially to and considered the arguments of those who differed with him, and thereafter had conscientiously formed and expressed his honest conviction and judgment upon the issues submitted to them, and, while the excerpt from the opinion in Allen's Case was a proper and persuasive argument for the standard and approved charge under such circumstances, it so slightingly treated the positive duty of each juror to form and to make his verdict express his own honest conviction, based on the evidence in the case, and so forcibly urged deference to the views of the majority and unanimity, that we are unable to resist the conviction that it tended too strongly toward coercion of the minority of the jury to surrender their honest convictions in order to acquiesce in the convictions of the majority. As was said by Judge Hook of the charge in St. Louis & S. F. R. Co. v. Bishard, 147 Fed. 502, 78 C. C. A. 62, the charge itself was not sufficiently guarded; its tendency was to bring the minority to an agreement with the others, even against the dictates of their own judgment.

"The jury in this case had deliberated many hours and had disagreed. There was at least one juror, perhaps more, that was convinced that the defendant was not guilty. The crucial questions in this case were questions of fact, that it was peculiarly the duty of the jury to consider and decide, among other things, the intention, the knowledge, the belief, the purpose, and good faith of the defendant Stewart. Much of the evidence on these questions was circumstantial; the testimony upon them was conflicting. The jury had disagreed. They received the supplemental charge from the court, retired, and in a short time returned

with a verdict of guilty. As was said by the Supreme Court in Burton's Case, 'A slight thing may have turned the balance against the accused under the circumstances shown by the record' (196 U. S. 307 (25 Sup. Ct. 250)), the supplemental charge and especially the excerpt from the opinion in Allen's Case were more than a slight thing, and our conclusion is that they bore too hard upon the convictions of the minority of the jury, and that an impartial and fair administration of justice will be served by a new trial on this case."

Respectfully submitted,

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We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 362

GRAHAME THOMAS SMALLWOOD, JR., ELIZABETH S. WIER, and ELEANOR BEASLEY NIEBELL, *Petitioners,*

v.

VIOLA A. HODSON, and MARGARET HYNSON STUDT, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered on May 29, 1957, in the consolidated cases herein involved. (Consolidated Cases Nos. 13,201 and 13,202, United States Court of Appeals for the District of Columbia Circuit.)

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported (R. 77-78). A copy thereof is hereto appended.

The opinion of the United States District Court for the District of Columbia on the question presented appears on pages 29-31 and 67 of the record.

JURISDICTION.

The judgments of the United States Court of Appeals for the District of Columbia Circuit were entered on May 29, 1957 (R. 79). A motion for rehearing was denied on July 2, 1957 (R. 95). The jurisdiction of this Court is involved under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED.

Are hospital records containing factual statements of the history of a patient's illness which were made at the hospital in the regular course of the business of the hospital by a member of the hospital staff at the time of admission of a patient from information furnished in part by the patient and in part by the Respondent Hodson for use by the hospital staff, admissible evidence under the Federal Shopbook Statute?

The United States District Court ruled that the hospital records were inadmissible and said (R. 29-30):

> "The Court. * * * You know, there are divergent rulings in different circuits on the Federal Shopbook Rule. The Second Circuit has a much more liberal interpretation of the Federal Shopbook Rule than this circuit has. I think in the Second Circuit this would be admissible. But in New York Life Insurance Company versus Taylor, and in a subsequent case of United States against Clainos, our Court of Appeals has limited the Federal Shopbook Rule to routine clerical entries. A statement of what somebody tells the

person who keeps the record, except for purely routine facts, is not, in my opinion, within the Court of Appeals opinions."

See also Record, page 67.

The Court of Appeals affirmed the United States District Court; its opinion is entirely silent concerning the admissibility of the hospital record of the statements made by the testatrix herself, and its opinion stated, for reasons which have no factual foundation in the record, that it was unnecessary for that court to decide the admissibility of the hospital record of statements made by the Respondent Hodson (R. 77-78).

Petitioners contend that the decision of the United States District Court, which was based upon the prior decisions of the Court of Appeals in *New York Life Ins. Co.* v. *Taylor*, 79 U.S. App. D.C. 66, 147 F. 2d 297, and *Clainos* v. *United States*, 82 U.S. App. D.C. 278, 163 F. 2d 593, is in conflict with the decision of this Court in *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (rehearing denied, 318 U.S. 800, 63 S. Ct. 757, 87 L. Ed. 1163), where this Court construed the Federal Shopbook Statute.

Petitioners also contend that there is a clear conflict between the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York Life Ins. Co.* v. *Taylor, supra,* which was followed and applied by the United States District Court in these cases, and the decisions of the Second, Third and Eighth Circuit Courts of Appeal on this question in *Ulm* v. *Moore-McCormick Lines, Inc.*, CCA (2d Cir.) NY 1940, 115 F. 2d 492 (certiorari denied 313 U.S. 567, 85 L. Ed. 1525), *Reed* v. *Order of*

United Commercial Travelers of America, (2d Cir.) CCA NY 1941, 123 F. 2d 252; *Pollack* v. *Metropolitan Life Ins. Co.,* CCA (3d Cir.) NJ 1943, 138 F. 2d 123; *Tucker* v. *Loew's Theatre & Realty Corp.,* CCA (2d Cir.) NY 1945, 149 F. 2d 677; *Woodward* v. *United States,* CCA (8th Cir.) Mo. 1950, 185 F. 2d 134, (reversed on other grounds, 314 U.S. 112, 95 L. Ed. 670).

From the foregoing it appears that a substantial question of evidence of great importance and of almost daily application in the Federal courts in all classes of cases and which arises out of the construction of a Federal statute is involved.

STATUTE INVOLVED.

United States Code Annotated, Title 28, Section 1732, pages 473-474, formerly Title 28, Section 695:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind. June 25, 1948, c. 646, 62 Stat. 945."

STATEMENT OF THE CASE.

The question presented arose in the trial of two cases which were consolidated for a joint trial in the District Court (R. 6 and 14) and were consolidated for a joint appeal in the Court of Appeals (R. 79). One of the cases was an action in the nature of an equity proceeding, to set aside a deed from Dorothy Smallwood Geare, deceased, to the Respondent Hodson (R. 2-5); the other was a contest of a will purporting to be the last will and testament of Dorothy Smallwood Geare, deceased (R. 10-14).

Parties.

Petitioners are the nephew and nieces and the only heirs at law and next of kin of Dorothy Smallwood Geare, deceased, who died on December 28, 1954. In the District Court they were the plaintiffs in the action to set aside the deed, and in the will contest.

Respondent Hodson is the sole grantee in the deed dated February 2, 1954, and recorded April 14, 1954, whereby the Decedent Geare conveyed to her without any consideration a valuable piece of real estate in the District of Columbia, improved by a house, which was furnished and bringing in rent of $156 per month. She was the sole defendant named in the petitioners' complaint to set aside the deed. Respondent Hodson is also the executrix and principal beneficiary of a paper writing dated February 2, 1954, purporting to be the last will and testament of Dorothy Smallwood

Geare, deceased, and was the defendant in the will contest.

Respondent Studt is the grantee in a deed from the Respondent Hodson whereby the Respondent Hodson conveyed to the Respondent Studt an undivided one-half interest in the real estate conveyed by the Decedent Geare to the Respondent Hodson. That deed was recorded after the filing of the petitioners' action to set aside the deed from the Decedent Geare to the Respondent Hodson. Respondent Studt was granted leave to intervene as a defendant in the petitioners' action to set aside the deed from the Decedent Geare to the Respondent Hodson. Respondent Studt is also a beneficiary of the paper writing purporting to be the last will and testament of Dorothy Smallwood Geare, deceased.

The Issues.

Among the issues which were common to these consolidated cases were the issues (1) of Dorothy Smallwood Geare's mental capacity to make the deed and will involved, (2) whether the deed and will were obtained, or the execution of them, procured from her by the fraud, deceit, undue influence, duress or coercion of the Respondent Hodson, and (3) whether a confidential relationship existed between Respondent Hodson and the Decedent Geare (R. 3, 13-14).

The hospital record of the factual statements of the history of her illness made by the testatrix herself was relevant to these issues. The hospital record which was on the usual and customary printed form entitled "Clinical Record" was dated April 30, 1954, the date on which the Decedent Geare was admitted to Saint Elizabeth's Hospital, and when the printed form was

filled out, it became a part of the records of Saint Elizabeth's Hospital. The hospital record, if admitted in evidence, would have shown the following (R. 67-68):

> "Patient is direct admission to hospital. She states she was taken from her home, where she lived alone, and brought here. Does not know why. She doesn't realize she is sick. She states she has been working in a store. She knew her husband died 30 years ago. She has no children, but some nieces and nephews. She is quite cooperative, pleasant, answers questions readily. At times she is incoherent. Shows gross memory defects, and is disoriented."

This hospital record, if admitted in evidence, would have shown that at a time near the making of the will and deed, Mrs. Geare did not know, as shown by other evidence, that she had been taken from Emergency Hospital, and not from her home, to Saint Elizabeth's Hospital, did not know that she lived with many people and not alone, did not know why she was taken to Saint Elizabeth's Hospital, did not realize she was sick, thought that she had been working in a store when as a matter of fact, she had worked for the Federal Government in a clerical capacity and had been retired on account of her illness, all of which was shown by other evidence (R. 23-25, 28, 70).

The hospital record of the factual statements of the history of the Decedent Geare's illness made by the Respondent Hodson, if admitted in evidence, would have shown the following (R. 28, 31-33):

On May 6, 1954, six days after the admission of Decedent Geare to St. Elizabeth's Hospital, Respondent Hodson was interviewed at the hospital by a hospital doctor, and the doctor filled out the usual

and customary printed form entitled "Clinical Record," which became a part of the hospital records, on which it is stated that Respondent Hodson was the Informant, and gave the following factual information relating to the mental condition of the patient (R. 32-33):

"Present Illness:

"Beginning about January of 1953, the patient began to lose weight. She went from 138 lbs. in January 1953 to 96 lbs. in December of 1953. Beginning in the winter of 1953, she was very fatigued. She would spend the whole weekend in bed. In the summer of 1953 she became too exhausted to go to work. Her appetite had been poor all of 1953. She needed more sleep than usual, although during the winter of 1953 she would get up sometimes at night, being unable to sleep. In September of 1953, the patient had an episode that was possibly a nonparalytic cerebrovascular accident in which her hands suddenly went cold and limp. During the early months of 1954, the patient seemed to be going more and more into a stupor. She had several heart attacks during March and April after the stuporous condition had begun. During March she did not recognize her old home that she lived in quite awhile. During the past six weeks (March and April), the patient had stopped reading. There is a possibility that she had visual hallucinations. She would greet people who were not there. It is also possible that when she went to Emergency Hospital on February 18, she may have had auditory hallucinations, for then the informant heard the patient say, 'My stomach says, "What do you know about that?"' Also, the patient apparently had delusions of location, thinking that she was in San Francisco. Apparently, she went to Emergency Hospital because of a severe heart

attack on April 17, going to Emergency Hospital on the 18th. At that hospital she got out of bed and began to pull the clothes off other patients. It was then that they asked that she be removed from the hospital. Hence, on the 30th, she was brought to Saint Elizabeth's Hospital."

This evidence was offered in the District Court under the provisions of the Federal Shopbook Statute to show that the mental incapacity of the Decedent Geare had existed, according to Respondent Hodson's own statements, before and at the time of the execution of the deed and will in question on February 2, 1954 (R. 28-30, 35, 65-67).

The District Court excluded the hospital records under the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York Life Ins. Co.* v. *Taylor, supra,* after calling attention to the conflict between the decision in that case and the decisions of the Court of Appeals of the Second Circuit, as hereinbefore shown and as will more fully appear from a reading of the record (R. 29-31 and 67). The District Court then indicated that counsel for the petitioners could put leading questions based on the hospital record to the Respondent Hodson (R. 29-31). Thereupon, counsel for petitioners attempted to elicit testimony from Respondent Hodson on the matters recited in the hospital record of her factual statements of the history of the Decedent Geare's illness. When counsel for petitioners attempted to insist upon an answer, other than "I don't remember" or "I told you I don't remember," the following occurred (R. 31):

"The Court. If she says she does not remember, then she can neither affirm nor deny."

The net result of this cross-examination of the Respondent Hodson was that she made no assertion concerning the statements attributed to her by the hospital records; she made no assertion that could be contradicted for the purpose of impeachment or any other purpose by any other witness.

Without the evidence contained in the hospital records of statements made by the testatrix herself and of statements made by the Respondent Hodson showing the Decedent Geare's mental incapacity at a time near the making of the deed and will involved, the petitioners' case was greatly prejudiced, and the jury found in favor of the respondents. The District Court then dismissed the deed case, taking the verdict of the jury in the will case as advisory in the deed case. Petitioners appealed both cases to the United States Court of Appeals for the District of Columbia Circuit (R. 9, 19).

Without deciding the substantial questions raised by the petitioners, the Court of Appeals affirmed the judgments of the District Court (R. 77-79). The opinion of the Court of Appeals is entirely silent concerning the admissibility of the hospital record of the statements made by the testatrix herself, and its opinion stated, for reasons which have no factual foundation in the record, that it was unnecessary for it to decide the admissibility of the hospital record of statements made by the Respondent Hodson. The reasons stated by the Court of Appeals, which have no factual foundation in the record, were as follows (R. 78):

> "* * * the exclusion of a hospital record containing a statement as to the decedent's physical and mental condition in 1953 and early months of

1954, indicated by the hospital record as having been made orally to a hospital doctor by Mrs. Hodson, was not in our view prejudicial. Mrs. Hodson was called as an adverse witness by appellants, and an effort could have been made to elicit testimony from her on all of the matters recited in her purported statement; if her testimony was inconsistent with the statement, appropriate steps could have been taken to attempt to discredit her, as by calling the doctor. This was not done. In the circumstances, the exclusion of the affidavits and the hospital record, even if erroneous—points which we do not find it necessary to decide—does not appear to be 'inconsistent with substantial justice.' See Rule 61, Fed. R. Civ. P. Reversal for a new trial is not warranted in either case because of the exclusion of this evidence."

The Court of Appeals evidently did not carefully review the record of these cases. The fact of the matter is that an effort was made to elicit testimony from Respondent Hodson on the matters recited in the hospital record of her statements, and her answers were, "I don't remember" or "I told you I don't remember," as hereinbefore shown (R. 31). She made no assertion that could have been discredited by calling the doctor or any other witness. No contradiction can be involved where there has been no assertion. See III Wigmore on Evidence, Third Edition, Section 1038, pages 723-724. Moreover, as pointed out by Associate Justice Edgerton, now Chief Judge Edgerton, in his strong dissenting opinions in *New York Life Ins. Co.* v. *Taylor*, 79 U.S. Appeals, D.C. 66, 70 and 75-80, and 147 F. 2d 297, 301 and 306-311, the purpose of the Federal Shopbook Statute was to obviate the necessity of calling witnesses in the

category of the member of the hospital staff who took and recorded the statements of the Respondent Hodson and the Decedent Geare.

The Court of Appeals' factually incorrect statements placed counsel for petitioners in a false light. They indicate that through ignorance or neglect, counsel failed to do something that could have been done, when the truth of the matter is, as shown by the record, counsel actually did what the Court of Appeals states "could have been" done; namely, an effort to elicit testimony from Respondent Hodson on the matters recited in the hospital record of her statements (R. 31). The Court of Appeals' further statement that "if her testimony was inconsistent with the statement, appropriate steps could have been taken to attempt to discredit her, as by calling the doctor," also implies that Respondent Hodson was not interrogated on her statements shown in the hospital record, when the truth of the matter is that she was interrogated but gave no testimony inconsistent with her former statements (R. 31). When counsel for petitioners attempted to insist upon an answer, other than "I don't remember" or "I told you I don't remember," the following occurred (R. 31):

> "The Court. If she says she does not remember, then she can neither affirm nor deny."

The rulings of the District Court and the Court of Appeals frustrated the object and purpose of the Federal Shopbook Statute, and prejudiced the petitioners' case. The statute intended that the hospital record should be admissible in lieu of the testimony of the person who made the record. The rulings which excluded the hospital records highly prejudiced

the petitioners' cases because they left the petitioners in a position where the petitioners could not and did not get before the jury the statements made by the Decedent Geare and the Respondent Hodson concerning the history of the Decedent Geare's illness.

JURISDICTION OF COURTS BELOW.

The United States District Court for the District of Columbia had jurisdiction of Case No. 13,201 under Section 11-306 of the District of Columbia Code, 1951 Edition, and of Case No. 13,202 under Sections 11-503 and 19-312 of the same code.

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction of both appeals under Section 1291, Title 28, of the United States Code Annotated.

REASONS FOR GRANTING THE WRIT.

Petitioners contend that the decisions of the United States Court of Appeals for the District of Columbia Circuit upon which the judgments in these cases rest are (1) in conflict with the decision of this Court in *Palmer* v. *Hoffman, supra,* and (2) in conflict with the decisions of the Court of Appeals for the Second, Third and Eighth Circuits on the admission of hospital records or similar records under the Federal Shop-book Statute. These two points are clearly established by the dissenting opinion of Associate Justice Edgerton, now Chief Judge Edgerton, on the original hearing of *New York Life Ins. Co.* v. *Taylor, supra,* and his dissenting opinion on rehearing of the same case. See 79 U.S. App. D.C. 70, and 75-80 or 147 F. 2d 301 and 306-311. Chief Judge Edgerton's dissenting opinions show that the decision of the United States

Court of Appeals for the District of Columbia Circuit in *New York Life Ins. Co.* v. *Taylor, supra,* is in conflict with the decision of this Court in *Palmer* v. *Hoffman, supra,* and in conflict with two decisions of the Court of Appeals for the Second Circuit, and in conflict with one decision of the Court of Appeals for the Third Circuit.

In *Palmer* v. *Hoffman, supra,* this Court stated that the Statute must be liberally construed. The very purpose of the Statute was to change the old common-law rule so as to eliminate the calling of witnesses to prove records made in the regular course of a business and to obviate the difficulties of such proof and the injustices that resulted where the persons making the entries on the books were dead, beyond the jurisdiction of the Court, or otherwise unavailable. This Court said in *Palmer* v. *Hoffman, supra,* at page 115:

> "The several hundred years of history behind the Act (Wigmore, supra, 66 §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But regular course of business must find its meaning in the inherent nature of the business in question and in the method systematically employed for the conduct of the business as a business."

A reading of the two hospital records involved will disclose that they consist of factual matters relating to the Decedent Geare's mental condition under circumstances where there could be no question of their trustworthiness or reliability. The facts were recorded by a member of the hospital staff at or near

the time of the admission of the Decedent Geare to Saint Elizabeth's Hospital. They were recorded at the hospital and were the usual and customary entries recorded with respect to all patients admitted. The entries were made in the regular course of the hospital's business and clearly related to the business of the hospital and particularly to Mrs. Geare's mental condition which was one of the issues involved in the trial of these cases. The hospital records were also relevant on the issue of undue influence, fraud, deceit, duress and coercion because it is well established that on these issues, evidence of the mental condition is relevant. A person who is mentally ill is more easily susceptible to undue influence, fraud, deceit, duress and coercion.

In the Courts of Appeal of the Second, Third and Eighth Circuits, factual statements relating to the illness of a patient, taken by the hospital doctor at or about the time of the admission of the patient and other entries made in the regular course of business and relating to the conduct of such business, were held to be admissible under the Federal Shopbook Statute as construed by this Court in *Palmer* v. *Hoffman, supra.* For example, in *Ulm* v. *Moore-McCormick Lines, Inc., supra,* hospital records similar to those involved in these cases were excluded by the District Court, and counsel was told there, as here, to "subpoena the doctor" to prove the statements. The Court of Appeals of the Second Circuit reversed the case and held that the hospital records were admissible under the Federal Shopbook Statute. That Court pointed out that the most important feature of the defendant's case was an attack upon the credibility of the plaintiff, and that the hospital records were par-

ticularly relevant to that issue, and were also important as to the extent and cause of the plaintiff's injuries. That Court held that the exclusion of the hospital records by the District Court "requires a reversal of the judgment below for a new trial."

Another example is *Woodward* v. *United States, supra,* where the Court of Appeals of the Eighth Circuit said, page 137:

> "* * * After all, the purpose of rules of evidence is to get at the truth; not to suppress it. * * *"

The holding of the United States Court of Appeals for the District of Columbia Circuit in these cases was that the exclusion of the hospital records was not prejudicial error. The holding of the Court of Appeals of the Second Circuit in *Ulm* v. *Moore-McCormick Lines, Inc., supra,* and *Reed* v. *Order of United Commercial Travelers of America, supra,* was that the exclusion of such hospital records was prejudicial error. Thus, there is a sharp conflict of opinion between the decisions of the United States Court of Appeals for the District of Columbia Circuit and the decisions of another circuit court of appeals.

We believe that the exclusion of the hospital records in these cases was prejudicial error. How can any court conclude from the record that the jury would not have reached a different verdict if the jury had learned from this reliable source of evidence that at a time near the making of the will and deed, the mental condition of Mrs. Geare was as shown by the hospital record of her own statements and the hospital record of the statements of the Respondent Hodson?

We submit that in view of the conflict between the decisions of the United States Court of Appeals for the District of Columbia Circuit and the decision of this Court in *Palmer* v. *Hoffman, supra,* and in view of the fact that the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York Life Ins. Co.* v. *Taylor, supra,* was not reviewed by this Court, and in view of the conflict between the decision in that case and the decisions of the Courts of Appeal of the Second, Third and Eighth Circuits, this Court should review the judgments in these cases, resolve the conflicts, and bring the decisions of the United States Court of Appeals for the District of Columbia Circuit in line with this Court's construction of the Federal Shopbook Statute in *Palmer* v. *Hoffman, supra.*

Thus a substantial question of evidence of great importance and of almost daily application in the Federal courts in all classes of cases and which arises out of the construction of a Federal statute is involved.

CONCLUSION.

In conclusion, it is respectfully submitted that for the reasons hereinbefore shown, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Court of Appeals' Opinion.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,201 and 13,202

GRAHAME THOMAS SMALLWOOD, JR., ET AL., APPELLANTS

v.

VIOLA A. HODSON, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

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Decided May 29, 1957

Mr. Arthur J. Hilland, with whom *Messrs. Paul M. Niebell* and *Thomas N. Kindness* were on the brief, for appellants.

Mr. Thomas M. Raysor, with whom *Mr. Carlton L. Saunders* was on the brief, for appellees. *Mr. Paul B. Cromelin* also entered an appearance for appellees.

Before WASHINGTON, DANAHER and BURGER, Circuit Judges.

PER CURIAM: These are appeals from judgments of the District Court sustaining the validity of a deed and of a will, both documents having been executed by the decedent on the same day. The deed case was tried by the judge sitting without a jury; the will case was tried before a jury.

Plaintiffs-appellants complain of the exclusion in both cases of certain evidence. The affidavits of two doctors,

which were attached to a lunacy petition signed and filed by defendant-appellee Hodson with respect to the decedent, were excluded. But the substance of these affidavits was repeated in the petition itself, which was before the court and jury. Hence the affidavits would have added nothing to the record as admissions by Mrs. Hodson against her interest—the only purpose for which they were offered. Similarly, the exclusion of a hospital record containing a statement as to the decedent's physical and mental condition in 1953 and the early months of 1954, indicated by the hospital record as having been made orally to a hospital doctor by Mrs. Hodson, was not in our view prejudicial. Mrs. Hodson was called as an adverse witness by appellants, and an effort could have been made to elicit testimony from her on all of the matters recited in her purported statement; if her testimony was inconsistent with the statement, appropriate steps could have been taken to attempt to discredit her, as by calling the doctor. This was not done. In the circumstances, the exclusion of the affidavits and the hospital record, even if erroneous—points which we do not find it necessary to decide—does not appear to be "inconsistent with substantial justice." See Rule 61, FED.R.CIV.P. Reversal for a new trial is not warranted in either case because of the exclusion of this evidence.

In No. 13,202, the will case, we cannot say that the supplemental instructions to the jury, taken as a whole, adversely affected the substantial rights of the appellants.

The judgments of the District Court will accordingly be

Affirmed.

Office - Supreme Court, U.S.
FILED
OCT 10 1957
JOHN T. FEY, Clerk

No. 362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

GRAHAME THOMAS SMALLWOOD, JR., *et al, Petitioners*

v.

VIOLA A. HODSON, *et al, Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 362

GRAHAME THOMAS SMALLWOOD, JR., *et al*, *Petitioners*
and ELEANOR BEASLEY NIEBELL, *Petitioners*

v.

VIOLA A. HODSON, and MARGARET HYNSON STUDT,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is correctly reported in the appendix to Petitioners' Petition for Writ of Certiorari filed herein. The comments of the

District Court in rendering its decision in the equity case are printed in full in Respondents' Counter-Statement of the cases hereafter.

JURISDICTION

The statements of jurisdiction of this Court and of the Courts below are adequately recited in the Petition.

RECORD

In addition to all printed appendices the original District Court transcript and all original exhibits which were before the Court of Appeals have been transmitted to this Court. The places where the statements of facts set forth in the Counter-Statement of cases appear in the Record are cited as follows: TR— original transcript; P. Ex. petitioners-appellants-plaintiffs' original exhibit; D. Ex. respondent-appellee-defendants' original exhibit; App. petitioners' printed appendix in the Court of Appeals; App. S. petitioners' printed supplemental appendix in the Court of Appeals; Appees. respondents' printed appendix in the Court of Appeals; Appees. S. respondents' printed supplemental appendix in the Court of Appeals.

QUESTION PRESENTED

The will and deed of Geare were executed by her on February 2, 1934. Seven witnesses testified as to her soundness of mind on that day and that she was under no constraint. None testified contra. None of the Petitioners testified at all though present in the courtroom throughout the trial. Considerable relevant factual hospital record data was admitted into evidence (Appees. S. 1-7) as to period April 18,

through April 30, 1954 when Geare was in Emergency Hospital. She later was in St. Elizabeth's Hospital one week from April 30, 1954 through May 6, 1954. Two physicians from St. Elizabeths Hospital also testified. Respondent Hodson was cross-examined at length as an adverse witness in the light of the foregoing evidence. She was also cross-examined relative to statements made by her to an official at St. Elizabeth's Hospital relative to Geare's history. Petitioners did not produce the official but sought to contradict her by introducing an unsigned Form dated May 6, 1954 (App. 32) from St. Elizabeth's Hospital files, containing other than routine entries and statements which generally appeared elsewhere throughout the trial and were merely corroborative even if admitted. The question is: Was it harmless error to exclude such evidence under Rule 61 Fed. R. Civ. P.?

COUNTER-STATEMENT OF THE CASES
No. 13,201

Petitioners, appellants below, were unsuccessful plaintiffs in the United States District Court for the District of Columbia in a suit to set aside a deed, dated February 2, 1954, conveying a residential parcel of real estate, subject to a substantial secured indebtedness, known as 3047 Porter Street, N. W., in the District of Columbia, from Dorothy Smallwood Geare, grantor, to Viola A. Hodson, grantee, and for an accounting. Hodson was a long time intimate friend of Geare and had agreed with the latter to convey an undivided one-half interest in the equity in this realty when she received it to Margaret Hynson Studt the god-child of Geare and also her close friend. Hodson carried out this agreement on April 13, 1954 by conveying an undivided one-half interest in this realty to

Studt. Geare died on December 28, 1954. Respondents, Hodson and Studt were defendants in the trial which ensued before a District Court Judge sitting as an equity judge to decide the issues whether Geare lacked capacity to make the deed on February 2, 1954 and whether that deed had been obtained by fraud, deceit, undue influence, duress or coercion. This is case No. 13201 in the United States Court of Appeals for the District of Columbia Circuit. The District Court decided for the Respondents as did the Court of Appeals.

No. 13,202

By will also dated February 2, 1954 (App. 10) Geare gave, devised and bequeathed all the residue of her property and estate "absolutely and in fee simple, unto Margaret Hynson Studt and Viola A. Hodson, share and share alike." Petitioners as Caveators attacked the will in the District Court on the grounds that Geare lacked mental capacity and that the will was obtained by fraud, deceit, undue influence duress or coercion. This is case no. 13202 in the United States Court of Appeals for the District of Columbia Circuit. The jury found in favor of Respondents' caveatees on all these issues and the Court of Appeals affirmed.

The two cases were tried simultaneously to jury and judge in the District Court and were consolidated for appeal.

Petitioners are, nephew and two nieces of the deceased. *Though present in the courtroom throughout the trials not one of them took the stand and testified.* In an effort to show cordial relationship between themselves and their aunt they introduced and read to the jury (1) a letter dated November 1948 giving permis-

sion to Grahame Smallwood (one of Petitioners) to copy certain lineage papers and giving certain family history which was signed "Affectionately, Aunt Dorothy" (P. Ex. 16) and a Christmas Card with a note from Aunt Dorothy expressing "Love and best wishes for 1953 (TR 190 *et seq.*).

Petitioners cases consisted principally of calling and cross-examining Respondent Hodson as adverse witness, producing testimony of a physician who saw Geare during the period April 30, 1954 to May 6, 1954 at St. Elizabeths Hospital (Dr. Anna Coyne Todd), and introducing hospital records of Emergency Hospital for the period April 18, 1954 to April 30, 1954 and St. Elizabeth's Hospital records for the period April 30, 1954 to May 6, 1954. Dr. Irma Belk Hobart of St. Elizabeth Hospital also testified but had insufficient recollection of the case to add anything material. Petitioners produced no direct testimony to support their contentions concerning the execution of the deed and the will on February 2, 1954 or shortly prior thereto or shortly thereafter.

Respondents on the other hand produced witnesses Edgar P. Hetzel and Katie May Ayre who testified as to the due execution of the deed and that Geare was of sound mind at that time and not under any constraint. The disinterested notary public Glenn C. Russell also testified to the same effect. Witnesses to the will Robert B. Smeltzer, a responsible businessman, and his son Robert Lionel Smeltzer, a lawyer admitted to practice in the District of Columbia and a businessman, testified that on the same day about three hours after the deed had been executed on February 2, 1954, Geare was of sound mind and capable of executing a valid deed or contract. The maid,

Elizabeth Hagler, testified to the effect that all day on February 2, 1954 Geare was competent and not under any undue influence. Withstanding a searching cross-examination, Hodson testified to the same effect. All of these witnesses as well as others indicated there was no undue influence, coercion, fraud or duress and that Geare was fully competent during this period.

Respondent Hodson testified that she was a close and intimate friend of Geare and had known her since 1910; that from time to time she loaned her money; that in March of 1942 Geare was an alcoholic who had been put out of her room and Hodson took her into her own home in Crestwood until she could find a place to live but she never left and asked Hodson to let her stay there; that Geare only contributed to her support sporadically; that she paid nothing in the last year of life (1954); that Hodson befriended her in many ways including driving her back and forth to work; that she obtained a job for Geare as an auditor in the Navy Department; that Hodson treated Geare like a sister; that in 1953 Geare's health started deteriorate and she lost weight after she had her teeth extracted and had a varicose vein operation; that she seemed to tire more easily; that in July 1953 she went on sick leave from her employment but returned and worked December 21, 22, 23, 24, 1953; that she voluntarily retired after the end of December 1953; that Geare continued to look after her own affairs and contracted with a Mr. Ward in September 1953 to repair her house at 3947 Porter Street, N. W.; that she attended a Christmas party in 1953 at the home of Mrs. Marguerite Hynson going and coming by herself; *that Geare's mental condition was sound at all times until Geare had a heart attack on March 22, 1954, that after that she became*

confused; that on April 18, 1954, she was taken to Emergency Hospital where she was more disoriented and confused; that she thought she was in San Francisco; that she got out of bed and walked around; that she was under sedation; that the officials at Emergency Hospital said they didn't have the facilities to look after Geare; that Hodson then made arrangements to transfer Geare to St. Elizabeths where she was transferred on April 30, 1954; that she was only there a week when she seemed better and asked Hodson to take her back into her home; that there was no adjudication and formal commitment; that the hospital officials at St. Elizabeths authorized Geare's return to Hodson's home on May 6, 1954; that Geare improved physically and mentally after that; that Geare was able to go out for hairdressing on August 18, 1954, and September, 1954; that on October 5, 1954, Hodson had to leave for Boston and she had no one to leave with Geare so she put her in Emergency Hospital at her physician's suggestion; that on Hodson's return Geare was worse; that on December 28, 1954, she died.

Witnesses Hynson, Studt, Hetzel, Hagler and Hodson testified in substance that around December, 1953, and January and February, 1954, Geare discussed disposition of her property; that she wanted the residue of her estate to be divided equally between Hodson and Margaret Hynson Studt, her godchild, who was the daughter of her college schoolmate, Mrs. Marguerite Hynson; that she wanted to deed the real estate to Hodson in order to increase the existing encumbrance so as to pay for repairs to continue to have the property rentable; that thereafter she wanted to deed the property to Hodson and Studt equally with the understanding that the income from the property

would be paid to Geare for life. With this agreement Geare conveyed property to Hodson on February 2, 1954, and after increasing the trust on April 13, 1954, Hodson conveyed an undivided one half interest to Studt. (Appees. 2, 3)

The considerable body of direct evidence for Respondents amply supported the findings of the District Court on November 3, 1955, which read as follows:

* * * * * *

> The Court: The issues relating to the validity of the will have been passed upon by the jury.
>
> Consolidated with the will contest, was the action to set aside the deed, and that action has to be determined by the Court without a jury.
>
> The Court stated, however, at the opening of the consolidated trial, that it would treat the verdict of the jury as advisory on those issues which were common to both cases. And treating the verdict as advisory, the Court is going to accept it and follow it.
>
> The Court might add that even if there were no advisory jury, the Court would independently reach the same conclusion.
>
> The Court finds that as of the date of the execution of the deed, the deceased had mental capacity to execute it;
>
> That the execution of the deed was not procured by any undue influence or fraud;
>
> And that the deed was intended to be a conveyance of the property in fee simple absolute, subject to a conveyance of a half interest to Mrs. Studt to whom Mrs. Hodson actually conveyed that half interest.
>
> The Court in conclusion may make the following comments.

The evidence on the issue of mental capacity was overwhelming that on February 2, and generally around that date, the decedent was in full possession of her mental faculties, and that she was fully aware of what she intended to do, and did exactly what she intended.

In fact, she would have been an ingrate if she had not given substantial recognition to Mrs. Hodson, who befriended her; who gave her a home in her declining years; and who was not being sufficiently or fully compensated for the room and board, and the care and the services, that she rendered.

The Court was impressed by the fact that although the psychiatrist found the testatrix of unsound mind sometime after she had a heart attack, and the psychiatrist testified that the condition must have existed for sometime prior to the examination, there was not a single witness who saw the decedent on or about February 2—some of whom were interested witnesses, but some of whom were disinterested—I repeat, there was not a single witness who saw the decedent around that time who *testified that she was otherwise than normal from* a mental standpoint.

The Court was impressed also by the circumstance that the caveators, the nephew and nieces, did not testify on this issue, or on any other issue. They did not testify because they did not know. They were not there. They never called to see their elderly aunt, although they were all living within easy distance. Their aunt was being befriended by a stranger, and yet this nephew and these nieces never having seen their aunt about this time, caused a document to be filed in this Court, alleging, in effect, that she was insane at that time. It seems to the Court that they were playing an ignoble part. I think it was due to thoughtlessness, rather than to evil intent, because

they are estimable and respectable people. But greed and cupidity sometimes makes even respectable people stoop to ignoble things.

They also caused a document to be filed attacking Mrs. Hodson as having exercised fraud and undue influence. The Court was impressed with the sincerity and the probity of Mrs. Hodson. She withstood a very able and skillful cross-examination, conducted in the best traditions of the Bar. She gave a very convincing explanation of how the deed and the will came to be drawn and executed. That she acted in good faith is evidenced in part by the fact that she testified that Mrs. Geare, the deceased, instructed her to convey a half interest in the property to Mrs. Studt, the godchild of the deceased, but in the meantime, she was to take the record title in her own name in order that it would be easier to obtain a loan on the property while Mrs. Studt might be in Panama.

This intent was carried out by Mrs. Hodson, although there was not a scrap in writing proving that Mrs. Geare gave any instruction to Mrs. Hodson to convey a half interest in the property to Mrs. Studt.

This is one of those cases that, unfortunately, happen all too often, where an elderly relative is cared for by a Good Samaritan, but is neglected by members of her own family; who stay away while the elderly relative is living, but spring forward to claim a share in the property after her decease.

I think the verdict of the jury is not only warranted and sustained by the evidence—no other conclusion was reasonable—but it also does equity, and is in accordance with good morals and good conscience.

The Court will render judgment for the defendant on the merits in the action relating to the deed, with costs to be assessed against the plaintiffs.

As to the will contest, besides the body of evidence previously summarized which was heard by the jury, as well as the judge, disinterested witnesses Robert B. Smeltzer and Robert Lionel Smeltzer proved due execution of the will. Witnesses Edna P. Hetzel, Katie May Ayre, Glenn C. Russell, Elizabeth Hagler and Viola A. Hodson proved the rational conduct of Geare throughout the day of February 2, 1954. Geare had luncheon downstairs when she was fully dressed; executed the deed around 5 to 5:30 P.M.; had dinner downstairs; watched newscast over television around seven o'clock; retired to her bedroom; executed will around 8 P.M. During day she even transacted some business. (Tr. 410)

Witnesses Studt, Hynson, Hetzel and Hodson testified of desire of Geare during end of December, 1953, and January and February, 1954, to dispose of her property by will, giving the residue to Hodson and Studt equally. Maid Hagler testified as to scraps of notes made by Geare around this time which she found on floor. (Tr. 475) Witness Hodson referred to handwritten notes made by Geare in January, 1954. (Appees. 5, 6, 7) Witness Hodson produced original letter dated February 17, 1954, (Appees. 9) from Geare which reads in part:

> "I am writing this memo in order to facilitate your work in disposing of my tangible personal property mentioned in item 'IV' of my Will dated February 2, 1954.
>
> First I wish to express to you, my devotion and gratitude for your love and care, and above all for your unfailing faith in me. Many times when all the world seemed black you have boosted my spirits and given me a new outlook on life. I shall be ever grateful for all your goodness to me.

The years since I came to you, in March, 1942, have been happy ones. As I have told you I have lived in your house longer than any place since I was born July 5, 1889. I wish to thank Frank for all his understanding care that has really made me feel secure in your home. Katie and Edna too, share in my grateful thanks. They have been wonderful understanding friends, and I love them dearly.

* * * * * *

To the children of my brother, namely Grahame T. Smallwood, Jr., Elizabeth Anne Wier and Eleanor Warrene Beasley, such photographs or family mementos they might desire, should they evidence any interest, but doubt that they will do so."

* * * * * *

Witness Phyllis M. Carpenter was Geare's supervisor at the Navy Regional Accounts Office of the Navy Department. She testified Geare was absolutely of sound mind in December, 1953 (Tr. 399); that Geare was an invoice auditor and very competent; that she saw Geare around latter part of February or early March, 1954, at Hodson's home; that Geare "definitely was of sound mind" (Tr. 400). Hodson used to bring Geare to work and occasionally she rode the bus (Tr. 406).

Witness Edna P. Hetzel testified that Geare's mental condition was good even to early March, 1954, but she was in rundown physical condition and had lost weight (Tr. 409). Geare was well taken care of by Hodson; anything Geare desired she had; and all the care she needed through the years (Tr. 420 *et seq.*). Hodson took her riding and fixed anything she wanted to eat. "It was a very loving kindness there." (Tr. 421) Wit-

ness Ayre stated Hodson treated Geare same as she did Ayre and Ayre was Hodson's sister (Tr. 450).

Witness Grissinger testified Geare was in her hairdresser shop as late as September, 1954, and on August 18, 1954 (Tr. 463), but never saw anything wrong with her mind (Tr. 465). "She had a brilliant mind" (Tr. 465).

Witness Hagler said as to clippings that Geare stated she was changing her will; that Geare said " 'Well, I am changing it because my relatives I haven't seen for some time.' And she says, 'No one loves me.' And she said, 'But for Mrs. Hodson, I would be sleeping in the park.' " (Tr. 475).

Witness Sisk, a real estate broker saw Geare once a week in January and February, 1954, and she was of good mental condition. Witness Greenstreet testified to the same general effect.

Witness Hynson testified she and Geare were College classmates in 1908 and had been friends thereafter; (Tr. 497); that they had Christmas dinner in 1953; that in January, 1954, Geare spoke to her about changing her will and she and her daughter Studt visited Geare; that Geare was then working on her income tax return (Tr. 498); that Geare said she wanted to include Studt in her will (Tr. 499); that her mental condition in December, 1953, and January, 1954, was as clear as it ever was.

Witness Studt corroborated her mother's testimony (Tr. 510) including Geare's statement that she intended to make her a beneficiary under her will (Tr. 513).

REASONS FOR DENYING WRIT

I

The Cases Are Matters of Local Law

These issues in these cases are factual and have been decided by the equity judge and the jury in favor of the validity of the deed and will. The judge determined as facts that the decedent had sufficient mental capacity to make the deed on February 2, 1954 and that the deed was not obtained by fraud, deceit, undue influence, duress or coercion. The jury decided as facts that decedent had sufficient mental capacity to execute her will on February 2, 1954 and that the will was not obtained by fraud, deceit, undue influence, duress or coercion.

There is no constitutional question involved. Petitioners are simply disappointed litigants who seek another hearing, having lost twice below, with the Court of Appeals rendering a unanimous *per curiam* opinion. The writ, sparingly exercised, should not be granted to review the evidence or inferences drawn therefrom by the judge and jury and already once thoroughly reviewed by the Court of Appeals. These are not cases of peculiar gravity, nor of great public concern. Neither do they involve great questions in the public interest.

II

The Alleged Error in Excluding Certain Evidence Does Not Affect the Substantial Rights of the Parties

Petitioners alleged various errors before the Court of Appeals but the only one now relied upon is the exclusion of an unsigned St. Elizabeth's Hospital admissions form purportedly made around May 6, 1954.

The full text of the Form is P. Ex. 14 printed in App. 32.

First it is significant to note that the paper was not signed merely containing the initials "J.M.W." (See original P. Ex. 14). J.M.W., whoever that was, was not produced for cross-examination at the trial although two physicians from St. Elizabeth's Hospital were produced under Petitioners' subpoena and testified, namely: Dr. Anna Coyne Todd and Dr. Irma Belk Hobart.

The "Standard Form 507" opens with a statement of opinion of the unsigned "examiner's" opinion as follows:

> "Note: The information appears to be valid. The informant is a well-dressed, cultural gentle woman, who makes a real effort to impress the examiner with her contacts in the Washington social scene. The patient has been living with the informant for the last 13 years" (App. 32.)

This was obviously properly excluded since there was no opportunity to cross-examine.

The Form then goes on to recite some admissions data but it is clear that routine entries of observed facts such as rate of pulse, blood pressure, amount of urine voided, etc., are not included. It contains conjecture which is at variance with sworn testimony such as "In September of 1953, the patient had an episode that was possibly a nonparalytic cerebro-vascular accident in which her hands suddenly went limp and cold" (App. 33). There is no testimony whatever in the case to support this statement. In fact the testimony of the large number of witnesses produced by Respondents is exactly the opposite. (See Counter-Statement of

Facts) "During the early months of 1954, the patient seemed to be going more and more into a stupor" (App. 33). Even Drs. Hobart and Todd of St. Elizabeth's Hospital staff admitted they had no first-hand information or knowledge prior to their examinations of Geare in May, 1954. Hodson denied under oath she had said that Geare had stopped reading in March and April, that Geare had visual hallucinations, or Geare would greet people not there. Appellee Hodson was under strict cross-examination; certainly she had the same right as to any persons seeking to contradict her.

The statement was further inaccurate when it states that Geare went to Emergency Hospital on *February 18*, Geare went on April 18. That was undisputed in the testimony.

The statements contained in the Form along the following lines are already repeated throughout the testimony: that beginning in January, 1953, Geare lost weight; that she was fatigued in 1953; that her appetite fell off; that she had heart attacks in March and April 1954; that she was disoriented and confused while at Emergency Hospital from April 18-30, 1954; that she thought then that she was in San Francisco; that at Emergency Hospital she got out of bed and pulled clothes off other patients; that they then asked that she be removed from the hospital; that on the 30th she was brought to St. Elizabeths. This much was conceded. If error to exclude, it was harmless. (Rule 61, Fed. R. Civ. P.)

The will and deed were executed on *February 2, 1954*. Seven witnesses—Hodson, Hagler, Robert B. Smeltzer, Robert L. Smeltzer, Hetzel, Ayre, Russell—all saw decedent on *February 2, 1954* and all testified

Geare was of sound mind and under no constraint. *No witnesses were produced to the contra* as to this date. It was conceded that on March 22, 1954, over a month and a half later, that Geare had a heart attack and became thereafter disoriented and confused; that on April 18, 1954 Geare was taken to Emergency Hospital and her condition worsened; that Geare was transferred to St. Elizabeths on *April 30 1954 (over two and one-half months after execution of the will and deed)*; that Geare remained only one week and was never adjudicated; that Hodson took Geare out of St. Elizabeth's Hospital with their permission on May 6, 1954 and returned her to her own home.

To admit this Form containing guesswork opinion of an unknown person would have been highly improper and prejudicial.

Furthermore lengthy hospital records containing accurate factual data were admitted in the case without objection. (See Appees. Supp. 1-7)

Rule 61 Fed. R. Civ. P. provides:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

This Form was also properly excluded under *New York Life Insurance Company* v. *Taylor*, 79 U. S. App.

D. C. 66, 147 F. 2d 297; *Clainos* v. *United States*, 82 U. S. App. D. C. 278, 163 F. 2d 593; *Palmer* v. *Hoffman*, (N.Y. 1943) 318 U. S. 109, 87 L. Ed. 645, rehearing denied 318 U. S. 800, 87 L. Ed. 1163.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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